Supreme Court, U.S.
FILED

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALCAN ALUMINUM CORPORATION

Petitioner,

v.

GREGORY N. BULLARD

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Federal Courts are required under *Erie v. Tompkins*, to submit a question of state law to the state court for determination when clear doubt exists as to state law illustrated by a lack of consensus in the federal court and the state provides a mechanism by which to certify the question.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Alcan Aluminum Corporation (d/b/a Alcan Corporation) was a wholly owned subsidiary of Alcan Inc., a corporation organized and existing under the laws of Canada.

Alcan Inc. spun off as of January 3, 2005 and now operates under the name Novelis Corporation.

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OPINIONS BELOW

The February 7, 2003 Judgment of the United States District Court for the Western District of Kentucky holding Alcan Aluminum Corporation ("Alcan") liable is reprinted in the Appendix at A-27.

The November 3, 2004 Opinion of the United States Court of Appeals for the Sixth Circuit affirming the lower courts decision and judgment against Alcan is reported at 113 Fed. Appx. 684 (2004) and reprinted in the Appendix at A-2. The January 21, 2005 Order of the Sixth Circuit denying Alcan's Petition for Re-Hearing En Banc is reprinted in the Appendix at A-1.

JURISDICTION

Subject matter jurisdiction of the United States District Court for the Western District of Kentucky was predicated on 28 U.S.C. §1322(a) and 28 U.S.C. §1332(c)(1).

Alcan timely appealed the judgment to the United States Court of Appeals for the Sixth Circuit in accordance with 28 U.S.C. §1291 as final judgment was rendered against Alcan on February 7, 2003.

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the lower court on January 21, 2005.

The Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

THE STATUTE INVOLVED

KRS § 342.185(1)

STATEMENT OF THE CASE

Introduction

This Court has made it clear that Federal Courts are to apply the substantive law of the forum state in diversity actions. Although this principle is well established, there is still considerable variation in its implementation. For example, the Eleventh Circuit has made it clear that any doubt as to the meaning of state law must be submitted to the state courts for resolution. *Baillie Lumber Co. v. Thompson*, 391 F.3d 1315, 1319 (11th Cir. 2004) citing *CSX Transp., Inc. v. City of Garden City*, 325 F.3d 1236, 1239 (11th Cir. 2003). This case illustrates an extremely relaxed policy that dramatically differs from the intention espoused by this Court in *Erie R.R. Co. v. Tompkins* 305 U.S. 673 (1938). In the case sub judice, the Sixth Circuit is apparently of the view that it has absolute discretion concerning its right to certify or not certify a question of state law to the forum state and does not feel obligated to certify in the case of clear confusion among the federal judges as to the meaning of the state law in question.

The Sixth Circuit was faced with a clear contradiction between the interpretation of the notice requirement in Kentucky's Workers' Compensation statute given by the District Court, and the interpretation given to the statute by the Kentucky Supreme Court arising out of the same factual context. In resolving this apparent contradiction, the Sixth Circuit, devised two contradictory explanations of the state notice provision, one given by the majority and a second explanation provided in the concurring opinion. What is

notable is that the majority and the concurring opinions both disagree on the two key elements of the statute: (a) whether notice is a mechanical requirement independent of the employer's actual knowledge; and (b) whether notice is a prerequisite to obtaining compensation benefits.

Alcan requested that the Sixth Circuit certify the issue of state law to the Kentucky Supreme Court in light of the contradiction between the majority opinion and both the concurring and District Court opinions. Alcan noted that certification was particularly appropriate because the Kentucky courts were actively engaged in applying this precise statute to the key facts in this case in the workers' compensation context; and, that if the Kentucky Court's view of the law is consistent with that of Alcan's, the Sixth Circuit will be powerless to correct the injustice it created.

The Sixth Circuit believes that even under these extreme circumstances, *Erie* does not obligate it to ensure that it is correctly applying state law. This Court should grant certiorari to make clear that *Erie* requires federal courts to use all reasonable means possible to ensure that state law is applied correctly, particularly when clear disagreement exists in the Federal Court as to the correct interpretation of Kentucky State Law.

Factual Background

This case arises from an action by the Respondent, Gregory Bullard, who filed a discrimination action against his employer, Alcan Aluminum Corporation ("Alcan" or "Company"), the Petitioner. The Respondent alleged that Petitioner terminated him for stating that he intended to file a worker's compensation claim. Respondent had degenerate

disc disease in his neck, which was surgically corrected under Alcan's funded health insurance program.

Upon completion of the surgery the Respondent told the Petitioner that his medical condition made it impossible for him to come to work even for light duty, which was required by the Company if one was unable to perform work expected, but albe to come into work and perform light duty functions such as talking on the phone, tending to paperwork, etc. Mr. Bullard requested that Alcan allow him to use the Company's college tuition reimbursement program to continue his college education by taking correspondence courses at home. It was represented by Mr. Bullard that he could not perform light duty functions at work due to his inability to drive to work and otherwise sit for long periods of time, so correspondence classes were his only option for attending college. The Petitioner approved college tuition reimbursement on this basis.

Throughout this period the Respondent processed all of his medical claims and expenses which were fully reimbursed through the Petitioner's health insurance program as though his condition *was not work-related.*

Later, Petitioner learned that the Respondent was attending college, full time, on campus, rather than taking correspondence courses as he represented in soliciting his reimbursement funds. During this period the Respondent was getting full pay, all his medical benefits and all of his college tuition paid by the Petitioner. Respondent was able to offer no justification for his conduct and was terminated.

After termination the Respondent filed a Workers' Compensation Claim ("WCC") and immediately thereafter

filed this discrimination lawsuit in federal court alleging he was terminated because he intended to file a WCC.

The WCC proceeded before the discrimination claim. In the WCC Petitioner argued that the Respondent had not given it timely notice as required by the KRS § 342.185(1). Respondent argued before the Administrative Law Judge ("ALJ") that he had told various co-workers and supervisors of his intention to the file the WCC. The ALJ did not credit the Respondent's testimony and held that Petitioner did not, in fact, have knowledge that the Respondent was claiming his condition was work-related until he filed the WCC claim. However, the ALJ held that Respondent's failure to give timely notice was excusable.

The Petitioner filed an appeal in the WCC case on the timeliness of notice, among other things.

Petitioner filed a motion with the district court in the discrimination claim for issue preclusion. The motion was based on the finding by the ALJ that Alcan had no knowledge that the Respondent intended to claim his neck condition was work-related. Consequently, Respondent's termination could not be based on retaliatory motives as a matter of law because a requisite element of proof for a finding of discrimination could no longer be submitted to the jury. The trial court denied the motion reasoning that timely notice was not a mandatory requirement under the Kentucky Statues for filing a WCC as long as the Respondent had filed his claim within the statute of limitations.

The same issue submitted to the ALJ was submitted to the jury. The Respondent "refined" his testimony in the discrimination claim based on his adverse experience with

the ALJ and the jury reached a contrary conclusion, awarding the Respondent damages for discrimination.

Petitioner appealed to the Sixth Circuit arguing that the district court was incorrect and that timely notice was a mandatory requirement to be entitled to WCC benefits not an alternative to filing within the statute of limitations. While the appeal was pending, the Kentucky Supreme Court adjudicated Petitioner's case in the WCC. The Kentucky Supreme Court held that Alcan had not received the mandatory notice and that the eight-month delay was not excusable. It remanded the case for a determination as to whether Petitioner had been prejudiced. This decision was presented to the Sixth Circuit as determinative of the issue that actual notice was mandatory under the statute.

The Sixth Circuit affirmed the District Court on a different and very peculiar basis. The two-judge majority opinion conceded that notice was mandatory but suggested the KRS § 342.185(1) only required formal notice and the actual knowledge of the Company was not relevant. Therefore, according to the majority all the ALJ determined was that Petitioner had not been given formal notice and the jury was still free to determine whether Petitioner had actual knowledge. This conclusion was rather peculiar in light of the fact that the evidence before the ALJ consisted of substantial assertions by the Respondent concerning the informal conversations which the Respondent claimed constituted actual notice, which were rejected as not credible by the ALJ.

> Bullard's employer, supervisors, and coworkers testified that Bullard never clamied to them that his neck problems were caused by a work-related injury, and the ALJ specifically found all of that testimony to be truthful."

Logan Aluminum, Inc. v. Bullard, No. 2003-SC-0162-WC (Sup. Ct. Ky. Feb. 19, 2004). (See Appendix at A-34).

The concurring opinion reached the same result but disagreed with the majority opinion on both issues. It concluded that Kentucky Law on notice did require an evaluation of actual knowledge and the Kentucky Supreme Court had affirmed the fact that Alcan did not have knowledge of the Respondent's intentions. Contrary to the majority; however, it concluded that notice was not an issue that the Kentucky courts were required to address as a prerequisite to WCC coverage.

Ironically, by reaching opposing conclusions as to the meaning of Kentucky Law on the two critical legal issues, the Sixth Circuit reached consensus on the result. Although the concurring opinion references the District Court opinion for the conclusion that notice is not required, it is not explicit as to whether that conclusion is dependent on filing within the statute of limitations as the District Court held or whether the notice was never required, but simply a recommendation. This raises the specter of not merely two contradictory views as to Kentucky Law in the federal courts but three contradictory opinions.

Petitioner filed a Motion for Reconsideration with a Suggestion for Rehearing En Banc pointing out that inconsistency of views expressed by the federal courts on the

meaning of Kentucky Law, the Eleventh Circuit admonition in *Jones v. Dillard's Inc.*, 331 F.3d 1268 (11th Cir. 2003), that any doubt as to state law mandates certification, and the existence of a procedure for certification, and requested that the issue of notice and whether it is or is not mandatory be certified.

The Sixth Circuit denied the Motion for Reconsideration with a Suggestion for Rehearing En Banc.

REASON FOR GRANTING THE WRIT OF CERTIORARI

I. Certiorari Should Be Granted to Establish a Consistent Practice Among the Circuits Requiring Certification when Disagreement Exists in the Federal Courts as to the Meaning of State Law

This case presents an unusually good set of facts within which to re-examine the practices of the federal court's implementation of this Court's directive in *Erie supra*. In that case, this Court explicitly recognized that federal judges had used federal common law to substitute their own views for that of state law.

> Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general"...As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 401, against ignoring the Ohio common law of fellow servant liability:

> I am aware that what has been termed the general law of the country – which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject – has been often advanced in judicial opinions of this court to control a conflicting law of a State. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views.

Id. at 78. Whether done intentionally or unintentionally, judicial commentators have lamented the non-existence of a state certification mechanism:

> Our task in this appeal is to predict whether the Supreme Court of New Jersey would recognize claims such as those asserted by the plaintiff. Unfortunately, we must make this prediction without specific guidance from the New Jersey appellate courts, for neither the Supreme Court of New Jersey or the Appellate Division has addressed the question that is now before us or any closely related question. If New Jersey law, like that of some other states permitted us to certify the issue to the Supreme Court of New Jersey, we would seek to do so here, because the question is both difficult and important.

Hakimoglu v. Trump Taj Mahal Assocs., 70 F.3d 291, 292-293 (3d Cir. 1995). That case like this case involved differences among the judges as to how the New Jersey Supreme Court would resolve a question of New Jersey law

and each of the judges expressed the desire *for* certification. In addition, in this case the Kentucky Supreme Court has already addressed one of the issues and the Kentucky courts are continuing to address those issues in the context of the remand litigation. Moreover, even after the Kentucky Supreme Court addressed the issue of notice, there exists continued disagreement among the federal judges as to the correct interpretation of Kentucky Law. Here the means for certification exist.

It is hard to imagine a more appropriate context in which to re-examine the *Erie* doctrine when certification is not merely appropriate, but required. We would urge this Court to use this case as a vehicle to describe those situations in which certification is required and ensure similarity of practices among the federal courts.

The Sixth Circuit has acknowledged the importance of certification. In *Grover by Grover v. Eli Lilly & Co.*, 33 F.3d 716 (6th Cir. 1994), it stated:

> Permission to certify questions of state law has been graciously extended by the highest courts of all the states in our circuit. Certification has proved to be an important tool for the federal courts sitting in diversity, since it frees them from having to speculate how state courts will decide important questions of state law.

Id. at 719. What can be a more important question of state law than permitting a state to ensure consistency in the construction and implementation of an eminent state function, its Workers' Compensation Program? What we believe this case illustrates is that lower courts can express

policy in a very similar manner, but apply it quite differently. In the end it is the application of policy that determines the predictability and consistency in the legal system.

Requiring certification when the federal bench cannot reach consensus on the meaning of state law is an obvious bright line standard for this Court to use to require certification. Judge Carnes noted in his dissent in *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994), that one can hardly imagine a more compelling case for certification when the federal bench is at odds with one another as to the meaning of state law:

> The difficulty of the unsettled state law questions in this case is evident from the fact that this Court is sharply divided over those questions. Six judges answer the state law question one way, four judges answer those questions the other way.

Id. at 1505. There is, of course, the issue of ensuring comity. Equally important is the compelling interest of citizens to a prompt and clear articulation of state law that mandates certification when such uncertainty is manifest. When confusion exists among the federal judiciary as to the meaning of state law, as Judge Carnes noted, the failure to certify unnecessarily perpetuates the uncertainty and to a degree magnifies the uncertainty:

> From our perspective, state law is what the state supreme court says it is. By contrast, when we write to a state law issue, we write in faint and disappearing ink: what we write does not bind any state court judge, and even as to the federal judges in this circuit, once the state supreme court speaks the

> effect of anything we have written vanishes like the proverbial bat in daylight, only faster. For every reason that it is important to decide controlling issues of law correctly and definitively, certification of unsettled questions of law is important.

Id. at 1504.

The importance of this issue is not limited to the Sixth Circuit. The issue of certification sharply divided the Ninth Circuit in *Ileto v. Glock Inc.*, 370 F.3d 860 (9th Cir. 2004) where a vast expansion of tort liability would likely flow from an incorrect application of California law. Callahan and Kozinski[1] expounded upon Judge Carnes' reasoning regarding the necessity of certification. "We should not have attempted 'to determine how the California Supreme Court might decide the issue,' but should have certified to the California Supreme Court to allow it to decide the issue in the first instance." *Id.* at 862.

This Court's guidance at this point can have a very significant impact in standardizing practices among circuit courts on certification and eliminating unnecessary uncertainty and burdensome confusion in state law.

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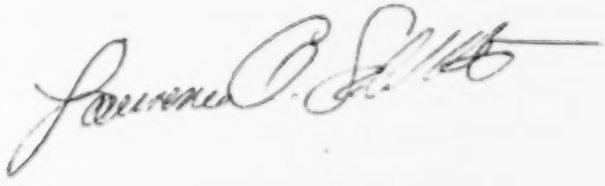
[1] Joined in their dissent by O'Scannlain, Kleinfeld, Gould, Tallman, Bybee and Bea.

CONCLUSION

In this case the Sixth Circuit is introducing uncertainty in a fundamental state law issue unnecessarily. It appears unmoved by the very real possibility its result may be quickly demonstrated to be inconsistent with state law and that it will be powerless to remedy the wrong it unnecessarily created. That does little to ensure comity, and frustrates efforts by the state courts to ensure that their citizens are similarly treated under state law.

Dated: April 18, 2005

Respectfully submitted,



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No. 03-5334
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY N. BULLARD,
Plaintiff-Appellee,

v. **ORDER**

ALCAN ALUMINUM CORPORATION,
Defendant-Appellant.

BEFORE: BOGGS, Chief Judge; GUY, Circuit Judge; and STEEH[1], District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk,

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[1] Hon. George C. Steeh, United States District Judge for the Eastern District of Michigan, sifting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY N. BULLARD, Plaintiffs-Appellees,
v.
ALCAN ALUMINUM CORPORATION, Defendant-Appellant.

Docket No. 03-5334

113 Fed. Appx. 684; 2004 U.S. App. LEXIS 23015

November 3, 2004, Filed

Before:

BOGGS, GUY, and STEEH
Circuit Judges

On Appeal From The United States District Court for the Western District of Kentucky.

Affirmed.

For GREGORY N. BULLARD, Plaintiff -- Appellee: William J. Rudloff, Rudloff, Golden & Evans, Bowling Green, KY.

For ALCAN ALUMINUM CORPORATION, Defendant -- Appellant: Lawrence A. Salibra, II, Alcan Aluminum Corporation, Mayfield Heights, OH; Elisa P. Pizzino, Akron, OH.

For KENTUCKY SOCIETY FOR HUMAN RESOURCES MANAGEMENT COUNCIL, INC., Amicus Curiae: Brent

R. Baughman, Greenebaum, Doll & McDonald, Louisville, KY.

For KENTUCKY CHAMBER OF COMMERCE, Amicus Curiae: Brent R. Baughman, Greenebaum, Doll & McDonald, Louisville, KY.

OPINION: [*686] **GEORGE C. STEEH, District Judge.** In this diversity case under Kentucky law concerning an alleged retaliatory discharge for pursuing a workers' compensation claim, defendant Alcan Aluminum Corporation appeals the district court's denials of summary judgment and judgment as a matter of law following a $ 370,400.00 jury verdict in favor of plaintiff Gregory Bullard, a verdict reduced by the district court to $ 363,984.64. Upon *de novo* review, we affirm.

I

Gregory Bullard began working for Alcan in 1995 as a technician whose primary responsibility was operating a forklift. Bullard's job entailed hauling remelted aluminum across a 40-acre factory, frequently driving the forklift in reverse "to save some time." Bullard began treating with chiropractor Dr. Merrill Patterson in 1996 after experiencing a stiff neck, headaches, and numbness in his arms and fingers. Dr. Patterson told Bullard that neck x-rays appeared normal. Bullard's symptoms nonetheless continued to get worse, and in the summer of 1999, he told a plant safety representative and a supervisor that he "was going to the doctor because I couldn't take that fork truck anymore, the headaches, the [**3] numbness and something had to be done."

Dr. Patterson x-rayed Bullard's neck a second time on August 17, 1999, telling Bullard "your neck is destroyed." Dr. Patterson wrote an August 18, 1999 letter to Alcan:

> Mr. Bullard has been diagnosed with C6-C7 cervical disc degeneration deterioration producing left brachial plexus neuritis. There is extensive osteophytosis and fusing of C6-C7 vertbal [sic] bodies occurring [sic].

I recommend he permanently refrain from looking back driving a tow motor at work.

I further suggest no lifting over 20 lbs. for two weeks commencing today. Bullard gave Dr. Patterson's letter to nurses at the Alcan plant, and a copy of the letter to his team leader Larry Carlisle. Bullard also told the plant nurses he was going to "make" a workers' compensation claim. According to Bullard, Alcan's nurses told him he needed a second opinion from a neurosurgeon to qualify for a permanent job restriction.

Using addresses supplied by the nurses, Bullard made an appointment with neurosurgeon Dr. Richard Berkman, who performed an MRI, and afterwards told Bullard that his neck was "destroyed by that fork truck at work." Bullard returned to the plant and [**4] told the nurses he was going to file a workers' compensation claim based on Dr. Berkman's assessment. Bullard provided Alcan with a note from Dr. Berkman on September 7, 1999, recommending that Bullard undergo neck surgery. Bullard was told by the plant nurses that "if I did not get the surgery I did not have a job." Bullard worked in a "light duty" area at Alcan from August 1999 until September 7, 1999.

Dr. Berkman performed neck surgery upon Bullard on September 23, 1999. Bullard thereafter presented supervisor Devon Harper with a note from Dr. Berkman indicating a "total disability." Bullard [*687] asked Harper for a "lighter job" working with computers in either the information systems department or in accounting. The request was denied. Instead, Bullard was placed on sick-leave at full pay and benefits, and was not required to report to work. In January 2000, Harper called Bullard to inquire about a tuition benefit that was to be paid to Western Kentucky University ("WKU") for classes Bullard was scheduled to take before his neck surgery. Harper later approved Bullard's request to use the tuition money to take correspondence courses at WKU, while clarifying Alcan's general policy not [**5] to provide tuition refund benefits to employees on sick-leave because "if they are able to go to school we expect them to come to work." Harper later learned Bullard was attending classes at WKU on campus. On April 9, 2000, Bullard met with Alcan's Harper and Carlisle at the plant, where Bullard was confronted about his representations that he was taking correspondence courses at WKU. Bullard, Harper, and Carlisle met again on April 12, 2000, and Bullard was discharged. Harper told Bullard he was fired for his misrepresentations about taking correspondence courses. According to Bullard, Carlisle also told him when the two were briefly alone that "you're being fired for making a false worker's comp. claim" by claiming that the neck injuries are related to driving a forklift for Alcan. Bullard applied for workers' compensation benefits on April 26, 2000, two weeks after his discharge, and filed this federal diversity action on May 5, 2000 alleging a wrongful retaliatory discharge.

With respect to the workers' compensation claim, an administrative law judge ("ALJ") with the Kentucky Department of Workers' Claims issued an Opinion Award and Order on October 24, 2000, awarding Bullard [**6] permanent partial disability benefits of $ 123.75 per week for 425 weeks, and temporary total disability benefits of $ 440.00 per week for the period of September 8, 1999 through June 5, 2000. Bullard was also awarded Vocational Rehabilitation ("VR") benefits as a "claimant unable to perform work for which he has previous training or experience." Alcan pursued administrative and state court appeals, and on February 19, 2004, the Supreme Court of Kentucky affirmed the ALJ's award, in part, concluding there was substantial medical evidence in the record to support the finding of a possibility that Bullard's medical condition was caused by his work, and that Bullard's workers' compensation claim was filed within the two-year statute of limitations period of KRS § 342.185. However, the Kentucky Supreme Court reversed that part of the ALJ's decision finding that Bullard had complied with the statutory notice requirement of KRS 342.185(1):

> The filing of this [April 26, 2000] claim eight months after Bullard first learned [by way of Dr. Patterson's August 18, 1999 letter] that his degenerative condition was work-related did not satisfy the statutory requirement to give notice [**7] "as soon as practicable." Thus, we remand this case to the ALJ for a determination of whether the employer "was mislead [sic] to his injury thereby," KRS 342.200, supra, i.e. was prejudiced by the failure to receive timely notice.

In the interim, on March 1, 2001, Alcan moved in federal district court for summary judgment of Bullard's retaliatory discharge claim, arguing that the ALJ's finding that Alcan did not receive notice of Bullard's work-related injury under KRS § 342.185(1) until Bullard filed his worker's compensation claim on April 26, 2000 collaterally estopped Bullard from attempting to prove in federal court that Alcan knew prior to Bullard's April 12, 2000 discharge that he was pursuing a [*688] workers' compensation claim. Alcan asserted it could not be held liable for an unlawful retaliatory discharge consistent with the ALJ's determination that Alcan first learned of Bullard's work-related injury claim only after Bullard had been fired. The district court denied Alcan's motion, reasoning that the notice issue was unnecessary to the ALJ's ultimate decision, which relied upon alternative grounds, and that Bullard should not be estopped from proving Alcan knew [**8] of his work-related injury before he was discharged because Bullard had no reason to appeal the ALJ's favorable decision.

Following trial in federal court, a jury returned a $ 370,400.00 verdict in favor of Bullard on his retaliatory discharge claim, with $ 250,000.00 awarded for mental anguish, embarrassment and humiliation, and $ 120,400.00 awarded for wages, income, and benefits lost as of the date of the February 4, 2003 verdict. Alcan thereafter moved for judgment as a matter of law, arguing that the ALJ's additional finding -- that Bullard was entitled to VR benefits as a "claimant unable to perform work for which he has previous training or experience" -- estopped Bullard from recovering lost wage and benefit damages because Bullard could not have worked at Alcan after September 8, 1999, even if he had not been discharged. The district court denied Alcan's post-verdict motion, concluding that the ALJ's award

of temporary total disability benefits for the period September 8, 1999 through June 5, 2000 evidenced that Bullard could have returned to work for Alcan, at least in some capacity, after June 5, 2000. Consistent with this reasoning, the district court reduced the jury's [**9] award of $ 120,400.00 for wage and benefit losses to $ 113,984.64, representing actual damages incurred by Bullard beginning June 6, 2000 through February 4, 2003.

II

Bullard initially argues that Alcan waived its right to challenge the sufficiency of the evidence supporting the jury's verdict because Alcan failed to move for a directed verdict at the close of all the evidence, as required by Federal Rule of Civil Procedure 50(b). Bullard misconstrues Alcan's arguments on appeal that, despite the sufficiency of evidence offered at trial, Bullard is estopped by operation of law from proving either a retaliatory discharge, or a compensable loss of wages, income, and benefits resulting from the April 12, 2000 discharge. Alcan raised these legal issues in its motion for summary judgment and motion for judgment as a matter of law, and has not waived its right on appeal to advocate the preclusive effect of the ALJ's decision. See 9A C. Wright & A. Miller, Federal Practice and Procedure § 2540, p. 366 (2d ed. 1995) (citing Warner v. Kewanee Mach.& Conveyor Co., 411 F.2d 1060, 1063 (6th Cir. 1969) for the proposition that: "If there have been errors at the trial, [**10] duly objected to, dealing with matters other than the sufficiency of evidence, they may be raised on appeal from the judgment even though there has not been either a renewed motion for judgment as a matter of law or a motion for a new trial").

III

This court reviews a district court's disposition on a motion for summary judgment and a motion for judgment as a matter of law *de novo.* H.C. Smith Invs. v. Outboard Marine Co., 377 F.3d 645, 650 (6th Cir. 2004); Hamad v. Woodcrest Condo. Ass'n, 328 F.3d 224, 234, 236 (6th Cir. 2003). In adjudicating a motion for summary judgment, the court must view the evidence and all reasonable inferences in a light most favorable to the nonmoving [*689] party. *Id.* As a federal court sitting in diversity, this court applies the standard for a motion for judgment as a matter of law as is used in Kentucky, as state law controls. H.C. Smith Invs., 377 F.3d at 650 (citing Potti v. Duramed Pharm., Inc., 938 F.2d 641, 645 (6th Cir. 1991)). Under Kentucky law, in ruling on a motion for judgment notwithstanding the verdict, a trial court is required to consider the evidence in the light [**11] most favorable to the party opposing the motion, giving the opposing party the advantage of every fair and reasonable inference which may be drawn from the evidence. Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. Ct. App. 1985) (citing Sutton v. Combs, 419 S.W.2d 775 (Ky. 1967)).

A

In determining whether the doctrine of collateral estoppel bars relitigation of an issue, this court applies the previous forum's law on collateral estoppel, here being Kentucky law. See Brindley v. Best, 192 F.3d 525, 530 (6th Cir. 1999) (citing McAdoo v. Dallas Corp., 932 F.2d 522, 524 (6th Cir. 1991)); Migra v. Warren City Sch. Dist. Bd. of Ed., 465 U.S. 75, 81, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984). The essential elements for applying collateral estoppel are: (1) an identity of issues; (2) a final decision or judgment on the merits; (3) a

necessary issue which the estopped party was given a full and fair opportunity to litigate; and (4) a prior losing litigant. Moore v. Kentucky, 954 S.W.2d 317, 319 (Ky. 1997) (citing Sedley v. City of West Buechel, Ky., 461 S.W.2d 556, 559 (Ky. 1970)).

In contrast, application [**12] of judicial estoppel is a matter of federal law, implicating federal policies different from those that support the doctrine of collateral estoppel. Edwards v. Aetna Life Ins. Co. 690 F.2d 595, 598 & n.4 (6th Cir. 1982). Collateral estoppel prevents the relitigation of factual matters that have already been considered and decided, thus preventing repetitive litigation, while judicial estoppel applies to prevent a party from asserting an inconsistent position in a subsequent proceeding. *Id.* at 598. The essential function of judicial estoppel is to protect the integrity of the judiciary as an institution by preventing intentional inconsistencies. *Id.* at 599. Consequently, judicial estoppel applies only if a party successfully asserted an inconsistent position in a prior proceeding. *Id.* at 599 (citing Konstantinidis v. Chen, 200 U.S. App. D.C. 69, 626 F.2d 933, 939 (D.C. Cir. 1980); City of Kingsport v. Steel & Roof Structures. Inc., 500 F.2d 617, 620 (6th Cir. 1974)). Judicial estoppel is an equitable doctrine to be applied in a court's discretion, considering such factors as whether a party's later position [**13] is "clearly inconsistent" with its earlier position, whether acceptance of a party's later position would create the perception that "either the first or the second court was misled," and whether the party asserting an inconsistent position "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." New Hampshire v. Maine. 532 U.S. 742, 750-51, 149 L. Ed. 2d 968, 121 S. Ct. 1808 (2001) (internal citations omitted).

To apply for and receive workers' compensation benefits in Kentucky, an employee must give notice of the work-related injury to the employer, as required by KRS § 342.185(1):

> No proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident [*690] shall have been given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident. . . .

"The notice and claim shall be in writing[,] . . . shall contain the name and address of the employee, . . . shall state in ordinary language the [**14] time, place of occurrence, nature and cause of the accident, with names of witnesses, the nature and extent of the injury sustained, and the work or employment in which the employee was at the time engaged, . . . shall be signed by him or a person on his behalf," and the written "notice may include the claim." KRS § 342.190.

To prevail on a workers' compensation retaliatory discharge claim under Kentucky statute KRS § 342.197(1), the plaintiff must prove that he was: (1) "engaged in statutorily protected activity," (2) was discharged, and (3) "there was a connection between the protected activity and the discharge." Henderson v. Ardco, Inc., 247 F.3d 645, 654 (6th Cir. 2001) (quoting Willoughby v. GenCorp., Inc., 809 S.W.2d 858, 861 (Ky. Ct. App. 1990)). An employee may maintain a retaliatory discharge claim under KRS § 342.197 where the employer fires the employee before the employee institutes formal compensation proceedings. Overnite Transp. Co. v. Gaddis, 793 S.W.2d 129, 130 (Ky.Ct. App. 1990). "A claim is established if the plaintiff proves she intended to file and

pursue a lawful workers' compensation claim.'" Southerland v. Hardaway Mgmt. Co., Inc., 41 F.3d 250, 256 (6th Cir. 1994) [**15] (quoting First Prop. Mgmt. Corp. v. Zarebidaki, 867 S.W.2d 185, 189 (Ky. 1994)).

> If we accept Overnite's contention, no one could proceed under KRS 342.197 unless and until an employee filed a formal claim for compensation. We do not believe that the Kentucky legislature intended such a restrictive application of the statute. Rather, the legislature's purpose in enacting KRS 342.197 was to protect persons who are entitled to benefits under the workers' compensation laws and to prevent them from being discharged for taking steps to collect such benefits. A requirement that an actual filing of a claim is the only event which would trigger the statutory protection would frustrate the legislative intent evidenced in KRS 342.197. In the face of such a requirement, an employer could, upon receipt of any notice that an employee intended to file for workers' compensation benefits, fire the claimant and avoid the consequences of KRS 342.197 entirely. Furthermore, such a requirement would result in a foot race, with the winner being determined by the event to first occur-either the firing of the employee or the filing of a claim with the Workers' Compensation Board. [**16]

Overnite Transp. Co., 793 S.W.2d at 130-131. Consequently, KRS § 342.197(1)[2] has been "construed to forbid retaliation for filing or pursuing a worker's compensation claim."

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[2] "No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter." KRS § 342.197(1).

Southerland, 41 F.3d at 256 (emphasis in original) (citing Overnite Transp. Co., 793 S.W.2d at 132). An employer may be held liable under KRS § 342.197(1) for retaliatory discharge if the jury believes that the employee's pursuit of a workers' compensation claim was one of the substantial factors motivating the discharge decision, notwithstanding proof that the employee would have lawfully been discharged anyway. First Prop. Mgmt. Corp. 867 S.W.2d at 188. An employee is not entitled to recovery if the employer proves the employee was discharged "solely [*691] because of her inability to perform her job." Southerland. 41 F.3d at 256. [**17]

The ALJ's findings that Dr. Patterson's August 18, 1999 letter, as provided to Alcan, did not constitute statutory notice under KRS § 342.185(1) because the letter did not apprise Alcan that Bullard's neck injury was work-related, and that Alcan first received "actual notice" under KRS § 342.185(1) when Bullard filed his workers' compensation claim on April 26, 2000, did not adjudicate the broader issue, properly presented to the jury, of whether Bullard's April 12, 2000 discharge was substantially motivated by Bullard's previously stated intent to pursue a workers' compensation claim. Southerland. 41 F.3d at 256; First Prop. Mgmt. Corp. 867 S.W.2d at 189; Overnite Transp. Co. 793 S.W.2d at 132. Bullard was not required to provide Alcan with statutory notice under KRS § 342.185(1) prior to termination to perfect a retaliatory discharge claim under KRS § 342.197(1). Overnite Transp. Co., 793 S.W.2d at 130-31. The issues of when an employer knew that an employee intended to pursue a workers' compensation claim, and when an employer received written statutory notice under KRS § 342.185(1), are completely different. [**18] Relative to Alcan's pre-termination knowledge of Bullard's intent to pursue a workers' compensation claim, Bullard testified to

the jury that he told Alcan plant nurses, a safety representative, and a supervisor well before he was discharged that he believed his neck injury was caused by driving the forklift, and that he intended to "make" a workers' compensation claim. Bullard further testified that team leader Carlisle told him the day he was discharged that "you're being fired for making a false workers' comp. claim." Construed in a light most favorable to Bullard, reasonable jurors could conclude that Alcan knew prior to discharge that Bullard intended to pursue a workers' compensation claim, and relied on that knowledge as a substantial factor in firing Bullard, notwithstanding Alcan's proofs to the contrary that Bullard was discharged for misrepresentations he made relative to tuition benefits. See First Prop. Mgmt. Corp., 867 S.W.2d at 188. Whether an employer was motivated to discharge an employee for intending to file a workers' compensation claim is ultimately for the jury to decide. Willoughby, 809 S.W.2d at 862.

The Kentucky Society for [**19] Human Resources Management Council, Inc., and the Kentucky Chamber of Commerce (collectively "Kentucky SHRM") have filed an *amicus curiae* brief asserting that Kentucky employers have the right to rely on the finality and binding effect of workers' compensation adjudications, arguing, as does Alcan, that Alcan could not have fired Bullard for filing a workers' compensation claim until Alcan received "notice" that Bullard intended to file a claim. Alcan and the Kentucky SHRM incorrectly equate written statutory notice under KRS § 342.185(1) with an employer's knowledge that an employee intends to pursue a workers' compensation claim. Requiring an employer to receive statutory notice under KRS § 342.185(1) before the employer can be found to know that an employee intends to pursue a workers' compensation claim is contrary to Kentucky's broad interpretation of

retaliatory discharge claims under KRS § 342.197(1). Overnite Transp. Co., 793 S.W.2d at 130-31. While the issues of whether and when an employer received statutory notice under KRS § 342.185(1) are questions of fact for the Kentucky Department of Workers' Claims to decide in adjudicating a workers' compensation [**20] claim, Eaton Axle Corp. v. Nally, 688 S.W.2d 334, 337 (Ky. 1985), it is for a jury to decide whether and when an employer knew an employee intended to pursue a workers' compensation claim, [*692] Willoughby, 809 S.W.2d at 862. The doctrine of collateral estoppel did not bar Bullard from litigating whether and when Alcan knew Bullard intended to pursue a workers' compensation claim, and whether Alcan's knowledge of that intent was a substantial factor used in the decision to discharge Bullard.

C

In adjudicating Alcan's post-verdict motion for judgment as a matter of law, the district court gave limited preclusive effect to the ALJ's finding that Bullard was entitled to temporary total disability benefits of $ 440.00 per week for the period of September 8, 1999 through June 5, 2000, by reducing the $ 120,400.00 jury award for wage and benefit losses to $ 113,984.64, in recognition that Bullard was not physically able to return to work until June 6, 2000. The district court explained:

> In workers compensation parlance, Mr. Bullard's temporary total disability meant that he could not return to work but had not reached maximum medical improvement from [**21] his injury. See K.R.S. § 342.0011(11)(a). His transition to permanent partial disability meant that he remained disabled but could

> return to work. See K.R.S. § 342.0011(11)(b). Certainly, then, Mr. Bullard could not have returned to work between his April 12 firing and June 5, 2000 even had he not been fired. After that, however, the ALJ determined that Bullard could return to work in another position. Able to work beginning June 5, Plaintiff was rightfully entitled to recover lost wages from that date until the date of trial.

Alcan reasserts the argument it advanced below, that the ALJ's additional ruling that Bullard was entitled to receive VR benefits under KRS § 342.710 as a "claimant unable to perform work for which he has previous training or experience" barred Bullard from litigating in federal court that he would have been able to return to work after his April 12, 2000 discharge, and thus barred Bullard from seeking actual damages for a retaliatory discharge. Alcan maintains that the ALJ awarded VR benefits to Bullard with respect to Bullard's permanent partial disability as opposed to his temporary total disability, thus finding that Bullard was unable to perform [**22] his previous work at Alcan for the 425 weeks Bullard was awarded permanent partial disability benefits.

The ALJ reasoned in his October 24, 2000 Opinion Award and Order:

> In this case, although the plaintiff has a significant injury, it is clear that the plaintiff is a talented and intelligent individual who is young and in the process of obtaining a marketable education. Although he has some restrictions which would prevent him from returning to his past work, they are not of such a nature that would prevent the plaintiff from performing any work on a regular basis in a competitive economy. Therefore, the plaintiff is

> entitled to permanent partial disability benefits based upon his impairment. . . . The plaintiff lacks the physical capacity to return to his past work. . . . The plaintiff has been assigned permanent restrictions by various physicians. He has not reached a level which permit [sic] a return to his past employment but his treating physician, Dr. Berkman indicated that he had reached maximum medical improvement and could return to some work as of June 5, 2000.
>
> . . . .
>
> . . . . Here, the plaintiff could clearly not return to his past work. He is attempting [**23] rehabilitation and is, in fact, enrolled as a junior in computer science. [*693] Therefore, I find K.R.S. 342.710 to be applicable and a vocational evaluation shall be ordered.

KRS § 342.710(3) provides in part:

> employee who has suffered an injury covered by this chapter shall be entitled to prompt medical rehabilitation services for whatever period of time is necessary to accomplish physical rehabilitation goals which are feasible, practical, and justifiable. When as a result of the injury he is unable to perform work for which he has previous training or experience, he shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment.

Kentucky has adopted a two-part rule in reconciling workers' compensation benefits and jury awards for damages:

> Although this is an issue of first impression in this jurisdiction, it is one which has been fully litigated in the federal system. The two-pronged rule developed by the federal courts is that (1) the employer is not liable for back pay for periods during which the employee is unavailable for work due to disability; [**24] and (2) workers' compensation benefits which represent compensation for lost wages may be deducted from a back pay award, but those which represent reparation for permanent physical injury are not deductible[.] We need not consider the first aspect of this rule, for that issue was not raised in this case. As for the second aspect, workers' compensation benefits in Kentucky are not intended as damages for injuries, but as compensation for wages lost or anticipated to be lost in the future.

Hardaway Mgmt. Co. v. Southerland, 977 S.W.2d 910, 919, 45 12 Ky. L. Summary 23 (Ky. 1998) (internal citations omitted). A Kentucky employer is entitled to credit for temporary total disability benefits paid to an employee while the employee was unable to work, as applied against a jury award for back pay and wages lost during the identical temporary total disability period. *Id.*

The ALJ's award of VR benefits pursuant to KRS § 342.710(3) upon a finding that Bullard was unable to physically perform his previous work at Alcan did not, as a matter of Kentucky law, decide the broader issue of whether Bullard could recover actual damages proximately caused by

Bullard's April 12, 2000 retaliatory [**25] termination in violation of KRS § 342.197. An employee such as Bullard who successfully litigates a retaliatory discharge claim under KRS § 342.197 is entitled "to recover the actual damages sustained by him, together with the costs of the law suit, including a reasonable fee for his attorney of record." KRS § 342.197(3). The ALJ's determination that Bullard was physically unable to perform his past job at Alcan permitted Alcan, at best, to seek a credit for the temporary total disability benefits paid to Bullard as applied against the jury's $ 120,400.00 award for lost wages and benefits. Hardaway Mgmt. Co., 977 S.W.2d at 919. The district court granted Alcan this relief. The ALJ's award of VR benefits compensated Bullard: for lost wages and wages anticipated to be lost in the future, not for mental anguish, embarrassment and humiliation for which the jury awarded Bullard $ 250,000.00.

To conclude, as Alcan requests, that Bullard was collaterally estopped from seeking any actual damages for the retaliatory discharge because the ALJ determined Bullard could not physically perform his past work, would require this court to hold under Kentucky law that a jury is [**26] first required to determine whether an employee is physically able to return to his past work before awarding damages for an unlawful [*694] retaliatory discharge. Such a broad holding is not supported by Kentucky precedent or statute. Hardaway Mgmt. Co., 977 S.W.2d at 919: First Prop. Mgmt. Corp. 867 S.W.2d at 188; KRS § 342.197(3). Bullard was not given an opportunity at the workers' compensation hearing to testify, as he did in federal court, that he returned to his former job after neck surgery under "light duty," raising a legitimate inference to the jury that he could have been returned to "light duty" work on and after June 6, 2000. We note that Alcan did not argue to the jury that Bullard was discharged

because he could no longer physically drive the forklift. Moreover, even if Bullard's inability to drive a forklift had been raised as a legitimate reason for termination, the jury could have still returned a verdict in favor of Bullard on his retaliatory discharge claim. First Prop. Mgmt. Corp., 867 S.W.2d at 188. The doctrine of collateral estoppel did not bar Bullard from pursuing actual damages.

D

The doctrine of judicial [**27] estoppel does not bar Bullard from recovering damages arising from his retaliatory discharge in violation of KRS § 342.197. Bullard's position before the ALJ, that he was entitled to VR benefits because he was unable to physically perform his past job at Alcan, is not "clearly inconsistent" with his position in federal court that he was entitled to an award of actual damages. New Hampshire. 532 U.S. at 750-51; Edwards. 690 F.2d at 599. Affirmance of the federal jury verdict as reconciled by the district court does not create a reasonable perception that either the ALJ or the district court was misled by Bullard. New Hampshire, 532 U.S. at 750-51. Bullard did not derive an unfair advantage, nor impose an unfair detriment upon Alcan. *Id.* Bullard did not receive a windfall or double recovery of his actual damages by operation of the reconciled verdict. Hardaway Mgmt. Co., 977 S.W.2d at 919. Of course, the Kentucky Department of Workers' Claims remains free to adjust Bullard's workers' compensation award on remand from the Kentucky Supreme Court.

IV

For the reasons set forth above, we AFFIRM the district court's [**28] denial of Alcan's motion for summary judgment and motion for judgment as a matter of law.

RALPH B. GUY, JR., concurring. I concur in the result and write separately to clarify my reasons for affirming the denial of Alcan's motion for summary judgment. Alcan argued that the ALJ's finding concerning "actual notice" collaterally estopped plaintiff from relitigating whether Alcan had notice of the alleged work-relatedness of plaintiff's condition before he was discharged. Absent such notice, Alcan argued, plaintiff could not establish that he was discharged in retaliation for pursuing a workers' compensation claim.

Collateral estoppel, or issue preclusion, bars further litigation of an issue if the issue is the same in both cases, the issue was actually litigated and decided in the first case, and decision on the issue was "necessary to the judgment" in the first case. *Yeoman v. Commonwealth*, 983 S.W.2d 459, 465-66, 45 13 Ky. L. Summary 36 (Ky. 1998). "Notice" was an issue in the workers' compensation case because the statute requires an employee to give written notice of an injury "as soon as practicable." KY. STAT. ANN. § 342.185(1) and § 342.190. Alcan denied that it knew Bullard was claiming [**29] his condition was work-related. The ALJ found both that plaintiff believed the letter conveyed the work-relatedness of his condition [*695] and that Alcan logically perceived it to indicate a non-work-related condition. After weighing conflicting testimony about whether plaintiff told his supervisors or others that his neck condition was caused by his work, the ALJ found that: "Actual notice to the defendant-employer occurred with the filing of the Form 101

on April 26, 2000." In this context, and given that the finding did not rest on the lack of a writing or other statutory requirements for giving notice, I would say the issue of Alcan's notice was the same in both cases and was actually litigated and decided in the workers' compensation case.

Nonetheless, I would conclude, as did the district court, that the "notice" issue was not necessary to the judgment in the workers' compensation case because that decision rested on the finding that the delay in giving notice was excusable and did not bar the workers' compensation claim. Alcan argued that this was wrong because timely notice is an absolute requirement for workers' compensation claims. In particular, Alcan relied on the decision of [**30] the Kentucky Supreme Court, issued during the pendency of this appeal, affirming in part and reversing in part the judgment in the workers' compensation case. The Court confirmed that the issue of notice can be dispositive and affirmed the ALJ's factual finding concerning actual notice, but held that plaintiff's mistaken perception concerning notice was not excusable cause for the delay. That did not end the matter, however, as the Court remanded for determination of whether Alcan was misled to its prejudice by the failure to receive timely notice. *See* KY. STAT. ANN. § 342.200 ("notice shall not be invalid or insufficient because of any inaccuracy in complying with KRS 342.190 unless it is shown that the employer was in fact misled to his injury thereby"). While the decision reopened the question of whether the delay would bar the workers' compensation claim, it did not alter the fact that the issue of actual notice was not "necessary to the judgment." In fact, this remains true as the ALJ has recently issued a decision on remand finding that Alcan was not prejudiced by the failure to receive timely notice and, therefore, plaintiff's workers' compensation claim was not barred. [**31]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION
CIVIL ACTION NO. 1:000V-89-R

GREGORY N. BULLARD PLAINTIFF

v.

ALCAN ALUMINUM CORP. DEFENDANT

ORDER

This matter is before the Court upon Defendant's motions for judgment as a matter of law (Dkt. # 116) and to modify judgment and for set-off (Dkt. # 118). Plaintiff has responded to each motion (Dkt. Nos. 119 & 120), and Defendant replied in support of its former motion (Dkt. # 121).

Defendant Alcan Aluminum Corp.'s instant motions follow a two-day trial that resulted in a jury verdict in favor of Plaintiff Gregory Bullard and an award of $120,400 in lost wages, income and employee benefits and $250,000 for mental anguish, embarrassment and humiliation. (Dkt. # 113.) In its motion for judgment as a matter of law, Defendant argues that Plaintiff suffered no actual damages because he could not have returned to work when he was discharged. Defendant's related motion to modify judgment and for set-off asserts that Plaintiffs verdict should be reduced by $15,312.96, which represents the amount awarded to the Plaintiff in workers' compensation.

Judgment as a matter of law is only appropriate if, viewing the evidence in the light most favorable to the

nonmovant, there is no genuine issue of material fact for the jury, and reasonable minds could only find in favor of the movant. *Gray v. Toshiba Am. Consumer Prods., Inc., 263* F.3d 595, 598 (6th Cit. 2001). Deciding upon a motion for judgment as a matter of law requires that a court review all of the evidence in the record, drawing all reasonable inferences in favor of the nonmovant. *Id.* at 600 (citing *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150-51 (2000)). The reviewing court is to make no credibility determinations and weigh no evidence. *Id.*

This case represents a companion suit to Mr. Bullard's pursuit of worker's compensation benefits. In his worker's compensation claim, ALJ Coleman determined that Plaintiff was entitled to temporary total disability benefits from September 8, 1999 through June 5, 2000. The ALJ also concluded that Mr. Bullard should receive permanent partial disability benefits commencing on June 6, 2000. Defendant unsuccessfully appealed ALJ Coleman's adjudication to the workers' compensation board and to the Kentucky Court of Appeals, and has most recently sought review by the Kentucky Supreme Court. Thus, the ALJ's decision has twice been reviewed and upheld, but is currently again under review and therefore not yet final.

Because the Plaintiff was terminated on April 12, 2000 – almost two months prior to his transition from a "temporary total disability" to a "permanent partial disability" – the Defendant argues that the ALJ's disability finding effectively terminated Bullard's employment with Alcan and eliminated any damages. This argument, however, is only partially correct.

In workers compensation parlance, Mr. Bullard's temporary total disability meant that he could not return to work but had

not reached maximum medical improvement from his injury. *See* K.R.S. § 342.0011(11)(a). His transition to permanent partial disability meant that he remained disabled but could return to work. *See* K.R.S. § 342.0011 (11)(b). Certainly, then, Mr. Bullard could not have returned to work between his April 12 firing and June 5, 2000 even had he not been fired. After that, however, the ALJ determined that Bullard could return to work in another position. Able to work beginning June 5, Plaintiff was rightfully entitled to recover lost wages from that date until the date of trial. Accordingly, Plaintiffs recovery for lost wages, income, and employee benefits must be reduced from $120,400 to $113,984.64.[3]

Next, Defendant contends that Plaintiffs jury award for lost wages, income, and employee benefits amounts to double recovery because it overlaps Mr. Bullard's workers' compensation recovery.[4] This argument misconstrues the nature of the workers' compensation system and ignores the fact that permanent partial disability benefits can be payable even where an injured worker has returned to work. *See Hardaway Mgmt. Co. v. Southerland,* 977 S.W.2d 910, 917-19 (Ky. 1998). Moreover, "[a] worker can be entitled to permanent partial disability benefits even if he or she has sustained no immediate loss of earnings, but has sustained an

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[3] To reach this figure, the Court first divided the total award of $120,400 by the number of workdays between April 12, 2000 and February 3, 2003 (732 days) to conclude that Plaintiff was compensated at a rate of $164.48 per day. That figure was then multiplied by the number of workdays between June 6, 2000 and February 3, 2003 (693 days) to reach the total compensation amount for that time period.

[4] In addition to making this objection in the corrected motion for judgment as a matter of law, Defendant also raises the same argument in its motion to modify judgment and for set-off.

impairment of future earning capacity." *Id.* at 919. Accordingly, Defendant's second argument must fail.

IT IS ORDERED:

Defendant's motion to modify judgment and for set-off (Dkt. # 118) is **DENIED.**

Defendant's corrected motion for judgment as a matter of law (Dkt. # 116) is **GRANTED IN PART** and **DENIED IN PART.** Plaintiffs award of lost pay, income, and employee benefits is reduced to $113,984.64.

This is the 31 day of March, 2003.

Thomas B. Russel
United States District Judge

Entered 04/04/03
Jeffery A. Apperson, Clerk

AO450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

GREGORY N. BULLARD

V.

ALCAN ALUMINUM CORPORATION

JUDGMENT IN A CIVIL CASE

Case Number: 1:00CV-89-R

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that plaintiff have and recover of the defendant, Alcan Aluminum Corporation, as set forth below:

For mental anguish, embarrassment and humiliation $250,000.00
For any loss of wages, income and employee benefits $120,400.00
For a total sum of $370,400.00.

Counsel for defendant shall have to and including February 18, 2003 to file motion for attorney's fee.

THIS IS A FINAL AND APPEALABLE JUDGMENT AND THERE IS NO JUST CAUSE FOR DELAY.

Thomas B. Russell
THOMAS B. RUSSELL, JUDGE
UNITED STATES DISTRICT COURT

ENTERED
2/7/03
JEFFREY A. APPERSON, CLERK
BY Lynn Lyons
DEPUTY CLERK

February 5, 2003
Date

Jeffrey A. Apperson
Clerk

Lynn Lyons
(By) Deputy Clerk

cc: Thurm
Rudloff
Pugsley
Sublett

113

RENDERED: FEBRUARY 19, 2004
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
2003-SC-0162-WC

LOGAN ALUMINUM, INC. APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2001-CA-816-WC
WORKERS' COMPENSATION BOARD
NO. 2000-WC-00479

GREGORY BULLARD;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REMANDING

This appeal is from an opinion of the Court of Appeals affirming a decision of the Workers' Compensation Board that had affirmed an opinion and award of the Administrative Law Judge finding Bullard to have sustained a 15% impairment rating due to a work-related cervical injury.

The questions on appeal are whether Bullard gave due and timely notice; whether his claim was barred by the statute of limitations and whether the ALJ misconstrued the medical evidence.

Bullard began working for Logan as a forklift operator in February 1995. The 39year-old man has a high school education and at the time of the hearing was enrolled at Western Kentucky University majoring in computer systems. He had served in the United States Marine Corps, working as an air traffic controller for ten years. His employment with Logan was ended in April 2000, although he last worked in September 1999, when he underwent a triple level discectomy and fusion surgery of the cervical spine.

Bullard testified that his primary duties at Logan required him to operate a forklift in reverse, twisting around to look behind him. He also testified that he operated the equipment over very rough terrain that jarred and bounced him. Bullard claimed that in 1996 he gradually began developing symptoms of neck stiffness, headaches and numbness in both arms. He asserted that he sought treatment from a chiropractor in 1997. In August 1999, the chiropractor told him his physical problems were related to his work at Logan. The chiropractor gave him a letter that identified his physical problems and recommended certain work restrictions. Bullard testified that he delivered the letter to the medical department, his supervisor and to personnel representatives. He also stated that he told three of his supervisors that his neck was bothering him and that "the fork truck was just killing me." He further testified that he told the medical department that he thought his condition was work-related. Bullard was then sent for a second opinion and was told that he needed surgery. He asked the medical department whether he should turn it in on his regular insurance or on workers' compensation.

Bullard was terminated on April 12, 2000 and his Workers' Compensation claim was filed on April 26, 2000. He admitted that he had filled out accident reports for

previous injuries, but that he did not fill out an injury report prior to the filing of this claim. Bullard stated that he did not work after September 8, 1999 and that he underwent surgery 15 days later. Thereafter, he obtained short-term disability benefits. He testified that he passed a physical upon leaving the Marines in 1993 and also passed a physical given by the employer prior to beginning his employment in 1995.

The ALJ took both lay and medical testimony on the issue of causation and determined that the physical problem was caused by repetitive motion on a daily basis. He relied on the evidence from Drs. Berkman, Gaw, and Byrd. He acknowledged that Dr. Ensalada gave an opinion that the condition was entirely related to the natural aging process. The ALJ concluded that Bullard sustained a 15% impairment rating due to a work-related cervical injury. The Board affirmed, as did the Court of Appeals by adopting verbatim the decision of the Board, stating that it (the Court of Appeals) had studied the record, the law and the briefs and determined that it could not improve on the opinion of the Board. This appeal followed.

I. Notice

Logan argues that the eight-month delay in giving notice was not excusable as a matter of law, and the decision of the AU should be reversed and the case remanded and dismissed. The employer contends that the provisions of the Act require notice of the "accident" to be given as soon as practical after the occurrence thereof. Citing Fiorella v. Clark, Ky., 184 S.W.2d 208 (1944), it asserts that "accident" does not mean the resulting injury, but it is the occurrence itself which causes the injury.

KRS 342.185(1) provides in pertinent part:

> [N]o proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident ....

(Emphasis added.)

KRS 342.190 provides:

> The notice and claim shall be in writing. The notice shall contain the name and address of the employee, and shall state in ordinary language the time, place of occurrence, nature and cause of the accident, with names of witnesses, the nature and extent of the injury sustained, and the work or employment in which the employee was at the time engaged, and shall be signed by him or a person on his behalf, or, in case of his death, by any one (1) or more of his dependents or a person on their behalf. The notice may include the claim.

(Emphasis added.)

KRS 342.200 provides:

> The notice shall not be invalid or insufficient because of any inaccuracy in complying with KRS 342.190 unless it Js shown that the employer was in fact misled to his iniury thereby. Want of notice or delay in giving notice shaìl not be a bar to proceedings under this chapter if it is shown that the employer, his agent or representative had knowledge of the injury or that the delay or failure to give notice was occasioned by mistake or other reasonable cause.

(Emphasis added.)

In a workers' compensation claim premised upon gradual injury by cumulative trauma, the requirement that the worker notify the employer of a work-related injury arises when the worker first learns that he has, in fact, sustained a work-related gradual injury. Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503, 507 (2001) (worker with gradual spine injury not required to notify employer until informed of injury by a medical professional as medical causation is "a matter for medical experts"); Alcan Foil Prods. v. Huff, Ky., 2 S.W.3d 96, 101 n.2 (1999). Bullard admits that he first learned that he had sustained a work-related gradual injury on August 18, 1999, when Dr. Merrill Patterson, his treating chiropractor, informed him of that fact. Dr. Patterson prepared a letter for Bullard to give to his employer that stated the following:

August 18, 1999
Logan Aluminum
PO Box 3000
Russellville KY 42276

Re: Gregory Bullard

> Mr. Bullard has been diagnosed with C6-C7 cervical disc degeneration deterioration producing left brachial plexus neuritis. There is extensive osteophytosis and fusing of C6C7 vertbral [sic] bodies occuring [sic].
>
> I recommend he permanently refrain from looking back driving a tow motor at work.
>
> I further suggest no lifting over 20 lbs. for two weeks commencing today.
>
> Sincerely,
>
> /s/
> Merrill Patterson, D.C.

Bullard delivered this letter to his employer and claims that he thus satisfied the statutory notice requirement set forth in KRS 342.185(1), supra. He subsequently underwent surgery and never returned to work. He was officially terminated from his employment in April 2000 and filed his Form 101, Application for Resolution of Claim, KRS 342.270(1), on April 26, 2000.

Dr. Patterson's letter did not attribute Bullard's condition to a work-related injury but only described a degenerative condition and established work restrictions incompatible with operating a forklift truck. Bullard's employer, supervisors, and coworkers testified that Bullard never claimed to them that his neck problems were caused by a work-related injury, and the AU specifically found all of that testimony to be truthful. However, the AU found that Bullard's failure to give notice was excusable under the "mistake or other reasonable cause" provision of KRS 342.200 because Bullard testified that he thought Dr. Patterson's letter satisfied the statutory notice requirement.

"The notice provisions have remained substantially the same since the inception of the Kentucky Workers' Compensation Act." Smith v. Cardinal Constr. Co., Ky., 13 S.W.3d 623, 627 (2000). In Northeast Coal Co. v. Castle, 202 Ky. 505, 260 S.W. 336 (1924), the injury occurred on December 28, 1919. The worker admitted that he did not report the accident to his employer and none of the company's employees were aware that it had occurred. The employer did not receive actual notice of the accident until the following April, more than three months later. The worker testified that he had asked his brother to notify his employer of the accident but that his brother had forgotten to do so. In other words, as here, the worker thought he had given notice though, in fact, he had not done so. In denying the claim, our predecessor court held, "Should these circumstances be deemed sufficient to show that the failure to give notice was occasioned by mistake or other reasonable cause, it would result in a practical nullification of the statute." Id. at 338.

As noted by the ALJ in this case:

> The plaintiff clearly states that the first time that he understood that his condition was simply not aggravated by his work, but instead caused by his work was when his chiropractor, Dr. Patterson, gave him a letter in August 1999 indicating that he permanently should not be looking backward while operating a tow motor at work.... The plaintiff perceived this to mean that his condition was caused by his work operating a tow motor.

Bullard v. Logan Aluminum, Inc., Case No. 00-000479 (Oct. 24, 2000). And with respect to notice, the AU found:

> Actual notice to the defendant-employer occurred with the filing of the Form 101 on April 26, 2000.

Id. These findings of fact were supported by substantial evidence and are, thus, conclusive. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

If the mere filing of a claim could per se satisfy the requirement of timely notice, the filing of a claim on the last day of the two-year period of limitations would suffice, thus nullifying KRS 342.185, KRS 342.190, and KRS 342.200, because, obviously, the, notice issue does not arise unless and until a claim has been filed. KRS 342.190 does not say that the filing of the claim satisfies the notice requirement

but that the "notice may include the claim." (Emphasis added.) The fact that the claim may be fled at the time notice is given does not eliminate the requirement that notice be given "as soon as practicable." "Notice of a work-related injury may be given in the context of filing a claim, but such notice may or may not be timely, depending on the circumstances." Hill, supra, at 507 (notice sufficient where there was a delay of only one month between date worker first learned he had sustained gradual work-related injury and date he gave notice by filing Form 101) (citations omitted); see also Peabody Coal Co. v. Powell, Ky., 351 S.W.2d 172, 173 (1961) (filing of claim two weeks after worker first learned he had silicosis was sufficient notice); cf. Smith, supra, at 628 (where employer received timely notice of accident and lumbar injury, filing of Form 101 two months later indicating worker had also suffered cervical injury in same accident was sufficient notice of cervical injury).

The filing of this claim eight months after Bullard first learned that his degenerative condition was work-related did not satisfy the statutory requirement to give notice "as soon as practicable." Thus, we remand this case to the ALJ for a determination of whether the employer "was misled to his injury thereby," KRS 342.200, supra, i.e., was prejudiced by the failure to receive timely notice.

II. Statute of Limitations

The employer argues that testimony from Bullard establishes that he was aware in 1996 or 1997 that his condition was caused by his work. It asserts that the finding by the ALJ that there was no evidence of a causal connection between his work and the injury until August 1999 was clearly erroneous and is contrary to the testimony of the employee. It maintains

that the claim should be dismissed because it was not timely filed, and the finding by the ALJ was clearly erroneous. We disagree.

The ALJ determined that the first real evidence of a work injury was given by Dr. Berkman on May 1, 2000. Nevertheless, the ALJ found that Bullard's perceptions indicated that he gained knowledge in August 1999. Thus, the AU concluded that the claim was timely because it was filed within the two-year statute of limitations of KRS 342.185. The decision of the ALJ is supported by substantial evidence in the record and should not be disturbed. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

III. Medical Testimony

Logan argues that the opinion expressed by Dr. Berkman was in terms of possibilities rather than probabilities and thus the case should be reversed. We disagree.

The ALJ did not misconstrue the testimony of Drs. Berkman, Gaw and Byrd in determining the work causation of the injury. The testimony of the three physicians establishes the probability that the condition was caused by his work. See Pierce v. Kentucky v. Galvanizing Co., Inc., Ky.App., 606 S.W.2d 165 (1980). The decision is supported by substantial evidence.

Therefore, we affirm the Court of Appeals on the issues concerning the statute of limitations and medical testimony, but we remand this case to the AU for a determination of whether the employer was prejudiced by the failure to receive timely notice.

All concur.

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COMMONWEALTH OF KENTUCKY
OFFICE OF WORKERS' CLAIMS
CASE NO: 00-00479

BEFORE: JOHN B. COLEMAN, ALJ

GREGORY BULLARD PLAINTIFF

VS **ORDER ON REMAND**

LOGAN ALUMINUM INC DEFENDANT

Hon. William J Rudloff
553 East Main St
Bowling Green, KY 42101

Hon. Charles E. Lowther
444 West Second Street
Lexington, KY 40507

1. This matter is on remand to the Administrative Law Judge from the Supreme Court. of Kentucky for the Administrative Law Judge to make a determination of whether the defendant-employer was prejudiced by the failure to receive timely notice.

1. The facts pertinent to this determination are that the plaintiff first learned that he probably had a work related cumulative trauma injury in August of 1999. He immediately gave a letter with work restrictions to his employer. The letter indicated that the plaintiff should refrain from operating a tow motor in reverse over rough terrain. In September of 1999, the plaintiff was sent by his chiropractor to a neurosurgeon who immediately performed at triple level fusion. The neurosurgeon performed the fusion surgery after taking diagnostic studies that same month. The neurosurgeon was an approved physician through the defendant-employer's insurance company. In April of 2000, the plaintiff was terminated and then filed his claim for workers' compensation benefits. The Administrative Law Judge has previously determined that the first actual notice received by the defendant-employer was in April of 2000. Thus, there was an eight month delay in giving notice. The diagnosis of the chiropractor in the letter addressed to the defendant-employer of August 1999 informed the employer, not only that he should refrain from driving the tow motor while looking backwards at work, but that the plaintiff had a diagnosis of osteophytosis and fusion of the C6-C7 vertebral bodies.

2. In addition to the treating physicians in the original proceeding, the plaintiff was evaluated by Dr. David Gaw who indicated that the plaintiff had undergone the fusion of C4 through C7 due to disc protrusions at those levels with a significant loss of motion. In regards to causation, he utilized a history of the plaintiff operating the tow motor in reverse on rough terrain while wearing a. seatbelt which required the plaintiff to turn his head frequently for the operation of the machinery. With this history, Dr. Gaw found the cause of the plaintiff's condition was his work with the defendant-employer. The defendant-employer had

the plaintiff evaluated during the original proceeding by Dr. Leon Ensalada who took the same history as did Dr. Gaw. However, he indicated that the three level fusion was due to spondylosis which was caused by the natural aging process. He did not feel the plaintiff's work contributed to this cervical spine condition. In addition, Dr. Bird felt the plaintiff's work contributed to his condition.

3. Since the order from the Supreme Court requiring the Administrative Law Judge to make a determination as to whether the defendant-employer was prejudiced by the failure to receive timely notice, the defendant-employer has filed additional evidence including a medical report Dr. Gene Wilson, a medical evaluation from Dr. Patrick Bray and a partial transcript of evidence from a jury trial regarding the plaintiff and the defendant-employer. Dr. Gene Wilson is the plant physician for Logan Aluminum who indicated in his report that there was an extensive process in place at Logan Aluminum for evaluating work related injuries. He indicated that the process was triggered by an employee suffering an accident or claiming that an injury or condition is work related. He indicated in the plaintiff's case that did not occur until he was off work and surgery had been performed. Therefore, no investigative or preventive measures could be taken. He indicated that it would be impossible to duplicate workplace procedures in a post-operative patient for an accurate determination of work relatedness. He went on to say that because the plaintiff's symptoms changed post-operatively from radicular symptoms to soreness and stiffness that it would become more difficult to investigate work relatedness. Likewise, Dr. Bray completed a report dated May 11, 2004 wherein he reviewed all of the plaintiff's medical evidence as well as the ergonomic evaluation conducted December 13, 2000. He indicated that in 1986, while stationed at a Marine Corps air

station in Buford, South Carolina, the plaintiff had complained of tingling and numbness in his right hand and forearm on one occasion. Then on April 16, 1993, the plaintiff had an x-ray of the cervical spine conducted at the Naval Hospital in San Diego which revealed some mild disc space narrowing at C4 through C7. The record then goes to August of 1996 when the plaintiff began receiving some cervical adjustments by Dr. Patterson. He noted the plaintiff's condition to have worsened with the referral to a neurosurgeon in September of 1999. He reviewed the MRI-scan of September 8, 1999 as revealing severe C4-C5 spinal stenosis with mild diffuse spinal cord compression, moderate C5-C6 spinal stenosis with cord compression and severe C6-7 spinal stenosis with cord compression caused by spondylosis and partially calcified left para-midline disc herniation. He noted that Dr. Berkman was surprised by the significance of the disease on the MRI. He noted that the plaintiff then underwent surgery on September 23, 1999 which involved the fusion of those areas. He noted that Dr. Ensalada examined the plaintiff on June 28, 2000 at which time the plaintiff had applied for short term disability, had been terminated from his employment, and was enrolled at Western Kentucky University as a full time student. He reviewed the conclusions of the ergonomic evaluation completed on December 13, 2000 which indicated, among other things, that there was no causal relationship between vibration and neck/shoulder musculoskeletal disorders. It also noted that the workplace where the plaintiff worked was not unusually uneven or 'rough and that the usual operation of the fork truck did not require repetitive movements of the neck or a great deal of time spent while driving the truck backwards. He concluded that the 1993 x-ray did reveal that the plaintiff had pre-existing degenerative cervical spine disease at a relatively early age and prior to his employment at Logan Aluminum and that he had no specific injuries to

his cervical spine at Logan Aluminum. He further indicated that the findings in the surgery of September 23, 1999 indicated degenerative, rather than traumatic, process and that the claim for workers' compensation benefits was not filed until seven months after the surgery. The ergonomic report indicated that the conditions complained of by the plaintiff did not exist in the plaintiff's specific job and workplace. He opined that the determining the cause and work relatedness of this gradual cumulative injury claim had become impossible following the extensive surgery that had reconstructed the plaintiff's anatomy. He gave the opinion that the opportunity to determine work relatedness and causation was irretrievably lost when the plaintiff underwent surgery by Dr. Berkman.

ANALYSIS AND CONCLSUSIONS

1. As is set forth in the defendant-employer's brief, there are three specific reasons which require an injured worker to provide notice of an injury to the employer as soon as practicable including: (1) to give the employer the opportunity to place the employee under the care of competent physicians in order to minimize his disability and the employer's liability; (2) to enable the employer to investigate at an early time the facts pertaining to the injury; and (3) to prevent the filing of fictitious claims when lapse of time makes proof or lack of genuiness difficult. Harlan Field Company v. Burkhart, Ky., 296 S.W.2d 722 (1956) and Whitaker v. Byard, Ky. 25 S.W.3d 118 (2000).

2. The task of the Administrative Law Judge given to him by the Kentucky Supreme Court is to make a determination of whether the defendant-employer was prejudiced by the failure to receive timely notice. As is set forth above, the purpose of the notice requirement is threefold. First, is to

give the employer an opportunity to place the employee under the care of competent physicians in order to minimize his disability and the employer's liability. Under these facts, the plaintiff had diagnostic studies including an MRI scan in September of 1999 which revealed severe C4-5 spinal stenosis with mild diffuse spinal cord compression, moderate C5-C6 spinal stenosis with cord compression and severe C6-7 spinal stenosis with cord compression caused by spondylosis and partially calcified left para-midline disk herniation. The significance of the plaintiff's degenerative disease was so significant that the treating physician was surprised and the triple level fusion was immediately undertaken by a physician who was approved by the defendant-employer's insurance carrier. In addition, I note that the evidence does not indicate that the results of the fusion surgery were undesirable and in fact, it could only be stated that under these facts, the liability of the defendant-employer had been minimized because of the good result from the surgery. In this instance, rather than claims of permanent total disability or chronic ongoing pain, the plaintiff has undergone surgery, been terminated from his employment, but immediately enrolled in full time schooling for the purpose of pursuing new employment. There is no indication that the impairment or disability has been increased in any way by the plaintiff's care which in this instance seems to have been very appropriate. Second, is to enable an employer to investigate at an early time the facts pertaining to the injury. In this instance, the facts pertaining to the injury have not changed. This is a cumulative trauma allegation wherein the plaintiff admittedly had some pre-existing degenerative disease in his cervical spine. He simply makes the allegation that operating a tow motor at work while looking backward over rough terrain during his work period has caused his condition to increase which has led to the findings noted on the MRI scan. None of these facts have

changed at any time. This is not a case where the plaintiff alleges to have suffered an acute onset injury which was unwitnessed by co-employees or employers. In fact, the defendant-employer has made an extensive investigation aimed at indicating the work environment did not lead to the plaintiff's work condition although his physicians have indicated otherwise. In addition, I note that the defendant-employer was immediately notified that the plaintiff should refrain from operating a tow motor at work in the original letter from the chiropractor in September of 1999 when the plaintiff first learned his condition could be work related. Therefore, the defendant-employer has not been prejudiced in that regard either. Finally, the requirement is to prevent the filing of fictitious claims when lapse of time makes proof or lack of genuineness difficult. The Administrative Law Judge has already touched on these facts as there is no indication that the plaintiff has simply made up an alleged event under suspicious circumstances. In this case, the plaintiff clearly had some pre-existing degenerative changes. A physician informed him that his job with the defendant-employer could be causing his problems and he immediately ceased doing that type of work. I cannot find that the claim is fictitious in any way.

3. The defendant-employer also argues that it has been prejudiced because it has been forced to defend a civil suit by the plaintiff and has actually entered testimony from that suit into evidence in this claim. The Administrative Law Judge has a hard time finding 'any correlation between whether the defendant-employer received notice and the plaintiff filing a separate civil claim. This has nothing to do with the reasons for the notice requirement set forth above and the Administrative Law Judge is not convinced by this argument. Instead, these facts point to the plaintiff simply being informed by his physician that his work with the

defendantemployer may be a cause of his complaints. The plaintiff immediately withdrew from the alleged offending work requirements and immediately came under the care of competent physicians who treated him in an appropriate manner. Therefore, the Administrative Law Judge is not convinced that the failure of the defendant-employer to receive timely notice until seven months following the plaintiff being informed that his condition was work related has prejudiced the defendantemployer in any way. Therefore, the benefits and order set forth in the previous opinion and award will remain unchanged.

SO ORDERED this 11 day of October, 2004, with copies to all parties by U.S. Mail.

/S/_____
JOHN B. COLEMAN
ADMINISTRATIVE LAW JUDGE

SENT TO ALL ALJS

Commonwealth of Kentucky

Workers' Compensation Board

OPINION ENTERED: March 21, 2001

CLAIM NO. 00-00479

LOGAN ALUMINUM, INC. PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

GREGORY BULLARD and
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AFFIRMING

******

BEFORE: LOVAN, Chairman, STANLEY and GARDNER,

Members.

STANLEY, Member. Logan Aluminum, Inc. ("Logan") appeals from an opinion, award and order rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"), wherein he found Gregory Bullard ("Bullard") to have sustained a 15% impairment rating due to a work-related cervical injury. On appeal, Bullard raises issues concerning notice, statute of limitations, and causation.

Bullard, born February 11, 1961, has a high school education and at the time of his hearing was enrolled at Western Kentucky University majoring in computer systems. He served in the Marine Corps for ten years working as an air traffic controller. He began working for Logan as a forklift operator/technician in February 1995. His employment with Logan was terminated in April 2000, although he last worked in September 1999 when he underwent a triple level discectomy and fusion surgery of the cervical spine.

Bullard testified that his primary duties with Logan required him to operate a forklift. He wore a seat belt and a majority of his work required him to operate the forklift in reverse, twisting around to look behind him. He further testified he operated the equipment over rough terrain which jarred and bounced him.

According to Bullard, in 1996 he gradually began developing symptoms of neck stiffness, headaches, and numbness in both arms. The symptoms began in 1996. Bullard testified he sought treatment from a chiropractor, Dr. Merrill Patterson, in 1997. He testified that by October 1998, he was having so much pain and numbness in his left arm he thought he was having a heart attack. By April 1999, his headaches were so severe they were causing nausea and sweating. Bullard admitted that as far back as 1996, he knew his stiffness was a result of driving the forklift, but he did not know what was causing damage to his neck.

Bullard acknowledged that in August 1999, Dr. Patterson told him his physical problems were due to his work with Logan. Dr. Patterson gave him a letter dated August 18, 1999 which stated as follows:

> Mr. Bullard has been diagnosed with C6-C7 cervical disc degeneration deterioration producing left brachial plexus neuritis. There is extensive ostophytes [sic] and fusing of C6-7 vertbral [sic] bodies occurring.
>
> I recommend he permanently refrain from looking back driving a tow motor at work.
>
> I further suggest no lifting over 20lbs. for two weeks commencing today.

Bullard testified he hand delivered the letter to the medical department; to his supervisor, Larry Carlisle; and, to Logan personnel representatives, Carl Knight and Shannon Johnson. He also testified that after Dr. Patterson told him his neck problems were due to his work, he told his three supervisors, Carl Knight, Shannon Johnson, and Brent Mefford, that his neck was bothering leader and medical personnel. White testified Bullard received short-term disability benefits and he never requested workers' compensation benefits or that his medical benefits be paid by workers' compensation. He testified that Bullard had a previous knee injury which was correctly reported. All

employees were trained in the process and reporting of workers' compensation claims.

Barbara Miller, occupational health nurse, testified she was never given notice of a neck injury by Bullard. She testified she had no recollection of any conversations with Bullard concerning the work-relatedness of any neck problems in August 1999.

Ellen Nealy, the head nurse for the medical department at Logan, testified that Bullard never gave notice in August 1999 of a work injury. He saw her numerous times because of pending neck surgery. She testified that Bullard delivered Dr. Patterson's letter dated August 18, 1999 to her. She testified that instead of turning it in as workers' compensation, Bullard drew short-term disability benefits for six months at full salary.

Larry Carlisle, finishing team leader and part of Bullard's team, testified he was never notified of any work injury in August 1999 or at any other time. He stated he was present at Bullard's exit interview and there was no mention of any work-related injury.

Shannon Johnson, operating technician and member of Bullard's team, testified he never recalled that Bullard said he had a neck condition due to his work. Bullard had told him he had damage to his neck but did not know where it came from. He recalled that Bullard had mentioned he was going to have surgery, but he had no recollection that Bullard told anyone his condition was due to his work.

Dr. Richard Berkman, a neurosurgeon, first saw Bullard on September 1, 1999. He ordered an MRI which showed impressive cervical spondylosis at C4-5, C5-6, and C6-7 with spinal cord compression and foraminal stenosis. Dr. Berkman then performed surgery on September 23, 1999, consisting of microscopic anterior cervical discectomy at C4-5, C5-6, and C6-7 and a bone graft and plating at those

cervical levels. In a letter to Bullard dated May 1, 2000, Dr. Berkman stated:

> I am in receipt of your letter dated April 15th, and I am saddened to hear that you were terminated at work. As a thirty-eight year old your imaging studies suggested the disease well out of proportion to a gentleman of your age. This suggests that the type of work that you participated in may have led to accelerated arthritis in your neck.
>
> Of course, there would be no way to know for sure, but certainly the type of work you have been doing did seem to be consistent with accelerating the disease in your neck and, again, as I stated above, your imaging studies suggested quite severe disease.

In a letter to Logan's counsel dated July 5, 2000, Dr. Berkman indicated that Bullard had reached maximum medical improvement and could return to work, but was not sure Bullard would be able to drive a forklift because it required a lot of head turning and was a vibrating machine. He assessed a 12% impairment to the body as a whole according to the AMA Guides for a three-level cervical disc problem surgically treated.

Dr. David Gaw, an orthopedic surgeon, evaluated Bullard on May 23, 2000, at the request of his attorney. He diagnosed (1) post-op cervical spine discectomy with fusion at C4-5, C5-6, and C6-7, and (2) significant loss of movement of the neck secondary to the above. He opined that the type of work Bullard described engaging in at Logan involved jarring on rough terrain and frequent awkward movement of his neck which most likely caused his present condition in that it aggravated pre-existing degenerative cervical disease. He placed restrictions of no lifting more than 25 to 30 pounds occasionally and only 10 to 15 pounds frequently. He felt Bullard should avoid riding on rough terrain, jarring or vibratory activities. He assessed a 27% impairment to the whole person due to loss of motion of the cervical spine, combined with the impairment due to surgery.

Dr. Leon Ensalada evaluated Bullard on June 28, 2000 at the request of Logan. On the issue of causation, Dr. Ensalada opined that within a reasonable degree of medical certainty, there was no probable causal relationship between Bullard's symptoms and the occupational injury or illness sustained while working for Logan. He felt Bullard's symptoms were neither caused nor aggravated by any occupational injury or illness due to his work for Logan. He felt Bullard's condition requiring a three-level fusion was due to spondylolisis and the natural aging process. He did assess a 15% impairment to the body as a whole for Bullard's cervical spine condition.

Dr. Robert Byrd examined Bullard on July 21, 2000 at his attorney's request. He diagnosed (1) s/p C4-5, C5-6, and C6-7 cervical fusion and discectomy secondary to degenerative changes of the cervical spine and (2) loss of range of motion of the cervical spine. He assessed a 36% impairment to the body as a whole and felt that Bullard's work contributed to his condition. He would limit Bullard to

maximum lifting of 25 pounds with no upward, downward or sideways motion of the cervical spine.

The ALJ reviewed the lay and medical testimony in the record and on the issue of work-relatedness/causation, concluded that Bullard's degree of degenerative arthritis was caused by the repetitive motion to which he was exposed every day at work. He further concluded that Bullard's severe degenerative disc disease in his cervical spine and subsequent triple level discectomy and fusion were proximately caused by the repetitive nature of his work with Logan. In doing so, he relied on the evidence from Drs. Berkman, Gaw, and Byrd. He also acknowledged that Dr. Ensalada opined that Berkman's condition was entirely related to the natural aging process.

On the issue of notice, the ALJ recognized that Dr. Patterson's letter was perceived differently by Bullard and his employer. Bullard testified that the first time he understood his condition was not simply aggravated but caused by work, was when he received the August 1999 letter from Dr. Patterson. He took this letter to his employer. The ALJ indicated that prior to that time, Bullard was aware that his work was aggravating his cervical spine, but did not think his work caused his cervical spine condition. The ALJ also indicated that Logan perceived the letter as only indicating a nonwork-related condition that was requiring work restrictions. for Bullard. The ALJ believed that the first evidence with regard to Bullard having a work-related cervical spine disease was Dr. Berkman's unambiguous letter dated May 1, 2000. Since Bullard had already filed his claim on April 26, 2000, notice was found to be timely, citing Alcan Foil Products v. Huff, Ky., 2 S.W.3d 96 (1999). The ALJ stated:

> In this particular case, the plaintiff believed that he gave

> notice in August of 1999 when he perceived that he had been informed that he had a work-related cervical condition. Actual notice to the defendant-employer occurred with the filing of the Form 101 on April 26, 2000. If a worker demonstrates a reasonable cause for delay in giving notice, then such a delay is excusable. Here, the plaintiff clearly thought he gave notice in August of 1999 by giving his employer the letter from Dr. Patterson which he perceived to indicate a work-related condition. This mistaken belief led to a delay in actual notice, as perceived by the defendant-employer. I find that such delay is excusable under these particular circumstances and therefore I do not find that notice operates to bar the plaintiff's claim.

The ALJ next found that Bullard filed his claim within the two-year statute of limitations provided for in KRS 342.185. Again, he cited Dr. Patterson's August 1999 letter as the first time Bullard had any indication that his condition was caused by work. Since his claim was filed on April 26, 2000, it was well within the two-year statute of limitations. The AU then relied on Dr. Ensalada's impairment rating of 15 % upon which to base Bullard's award.

On appeal, Logan raises arguments concerning notice, statute of limitations, and causation. It contends that Bullard did not give due and timely notice pursuant to KRS 342.185 and Alcan Foil Products v. Huff, supra, and his failure to give notice is not excusable as a matter of law.

Cumulative trauma claims continue to present a never ending variety of vexatious patterns dealing with the statute of limitations and the giving of notice. As is evident from the ALJ's opinion and his struggle with the facts presented before him, this case presents yet another difficult scenario. The application of the statute of limitations and the giving of notice in cumulative trauma claims have recently been considered by the Supreme Court in Special Fund v. Clark, Ky., 998 S. W .2d 487 (1999) and Alcan Foil Products v. Huff, supra. In Alcan, the Court clearly held that the requirement to give notice and the clocking of the statute of limitations begins to run on the date a claimant becomes aware of his "work-related" condition and not the date that disability becomes manifest. The Court therefore construed the meaning of the term "manifestation of disability," as used in Randall Co. v. Pendland, Ky.App., 770 S.W.2d 687 (1989), as referring to physically and/or occupationally disabling symptoms that lead the worker to discover that a work-related injury has been sustained.

KRS 342.185 provides that notice of an accident must be "given to the employer as soon as practicable after the happening thereof. " The question of adequate notice must be determined by the factual situation in each claim. Kirkwood v. John Darnell Coal Co., Ky., 602 S.W.2d 107 (1980) and Columbus Mining Co. v. Childers, Ky., 265 S.W.2d 443 (1954). The purpose of the requirement of notice of an accident or injury is twofold. First, notice of an injury enables the employer to provide immediate medical diagnosis and treatment with a view to minimize the

seriousness of the injury. Second, notice facilitates the earliest possible investigation of the facts surrounding the injury. A. Larson, Larson's, Workers' Compensation, (Desk Edition 1997), §78.10 at 15-5.

The Courts have consistently held that the requirement to give due and timely notice is not based upon a specific timeframe. Courts have long struggled with what constitutes as soon as practicable and have stated that such determination may not simply be computed based upon the number of days from the incident to the notice. See, Marc Blackburn Brick Company v. Yates, Ky., 424 S. W .2d 814 (1968). In reaching such a conclusion, the ALJ must not only consider KRS 342.185, but also KRS 342.200 to determine whether the delay was reasonable or whether there was evidence of record which would lead to a reasonable explanation for the delay. In Newberg v. Sleets, Ky., 899 S.W.2d 495 (1995) the Court reiterated a principle set forth previously in Marc Blackburn Brick Company v. Yates, that KRS 342.200 affords claimants some degree of liberty in fulfilling the notice requirement "to effectuate the beneficent purposes of the compensation Act." While not retreating from the provision in KRS 342.185 requiring notice of an injury as soon as practicable, the Court in Sleets reminded us of the statement in Marc Blackburn that "[t]he nature of the injury is important on the question of notice insofar as it relates to the knowledge of the injured person of the extent of his injury."

Notice is a mixed question of law and fact. Harry M. Stevens Co. v. Workers' Compensation Board, Ky.App., 553 S.W.2d 852 (1977). A finding pursuant to KRS 342.200 we believe, however, is a factual finding and so long as there is evidence that supports the ALJ's conclusion, the decision may not be disturbed on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). We find that the evidence relied upon by the ALJ does constitute substantial evidence

of probative value and therefore, his finding that due and timely notice was given may not be disturbed. Furthermore, contrary to Logan's argument, the filing of a claim is sufficient notice under the Act and is specifically provided for in KRS 342.190.

Having reviewed the facts sub judice, the ALJ's decision, arguments of counsel, and applicable law, we find the ALJ did not commit error in finding that Bullard gave due and timely notice. As found by the ALJ, Bullard understood his condition to be work-related upon receipt of the August 18, 1999 letter from Dr. Patterson. He delivered this letter to his employer shortly thereafter, believing he had given notice of his injury. As found by the ALJ, the employer did not perceive the letter as indicating work-relatedness of Bullard's cervical condition. It was not until the filing of Bullard's claim in April 2000 that Logan perceived actual notice of a work-related condition. Due to the confusing nature of giving of notice in cumulative trauma claims, as is evident from the fact pattern herein, we find ourselves in agreement with the ALJ that Bullard gave due and timely notice of the work-relatedness of his cervical condition.

Logan also argues that Bullard's claim should have been barred by the statute of limitations in that he became aware of the work-relatedness of his cervical condition in 1996 or 1997. The ALJ relied on Bullard's testimony that he did not understand the work-relatedness of his condition until he received Dr. Patterson's August 18, 1999 letter. Bullard testified that while he knew driving the forklift made his neck stiff, he did not connect the work-relatedness of his condition until he received Dr. Patterson's letter. As with the issue of notice, this issue concerns when Bullard was aware of the manifestation of his disability. Inasmuch as the ALJ determined the manifestation of disability to be iri August

1999 and Bullard's claim was filed in April 2000, it was timely filed within the two year statute of limitations of KRS 342.185. The ALJ's decision is supported by substantial evidence in the record and we are without authority to find otherwise. Special Fund v. Francis, Ky., 708 S . W .2d 641 (1986).

Lastly, Logan argues the AU misconstrued the testimony of Dr. Berkman on causation. The AU relied on the testimony of Dr. Berkman, Dr. Gaw, and Dr. Byrd to find work causation of Bullard's cervical condition. Contrary to Logan's arguments, we believe these three physicians clearly establish the probability that Bullard's condition was caused by his work at Logan. See, Pierce v. Kentucky Galvanizing Co., Inc., Ky. App. , 606 S . W .2d 165 (1960). Again, the ALJ's decision is supported by substantial evidence in the record and we are without authority to find otherwise.

Accordingly, the decision by Hon. John B. Coleman, Administrative Law Judge, is hereby **AFFIRMED**, and the appeal by Logan Aluminum, Inc. is **DISMISSED.**

ALL CONCUR.

LOVAN, CHAIMAN. I concur with both the reasoning and the result reached in this matter. I offer this concurrence only because I believe the result here is very fact specific. While not intending to do so, there are occasions when language in our opinion is believed to be more all encompassing than it is.

My concern is primarily addressed to the question of when an individual believes he has given notice. Based upon the facts of this claim, there is no question but that Bullard believed that the medical report provided to Logan in August of 1999 in connection with the restrictions set forth in that letter and his comments to his supervisors that "the fork truck was just killing me" led to a reasonable belief that due and timely notice had been given. Notice has two elements,

one being a harmful change in the human organism, i. e. injury, and also an element of work- connectedness, i.e. accident. See Fiorella vs. Clark, 298 Ky. 817, 184 SW2d 208 (1944). However, in that context, simply because operates as a benefit to the employer. It has as its purposes providing information to an employer that would reasonably apprise them of the existence of a work-connectedness that necessitates investigation, the opportunity to assist the injured worker in securing medical treatment, and, if necessary, the alteration of work activities that might have caused or be contributing to the injury. While the AU herein believed Logan did not interpret Bullard's comments or the letter from Dr. Berkman as communicating these matters, I believe that under these circumstances it was also reasonable for the ALJ to conclude these elements of due and timely notice had been satisfied.

Accordingly, I, too, would affirm the Administrative Law Judge and dismiss this appeal.

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COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS CASE
NO: 00-00479

BEFORE: JOHN. B. COLEMAN, ALJ

GREGORY BULLARD PLAINTIFF

VS **OPINION AWARD AND ORDER**

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VOCATIONAL REHABILITATION ORDERED

INTRODUCTION

The plaintiff, Gregory Bullard, filed this claim against his former employer, Logan Aluminum Inc., on April 26, 2000. The plaintiff alleges that he received a work-related cumulative trauma injury to his cervical spine with a manifestation date of August 18, 1999. A heating was conducted in this matter and the parties have filed their post hearing briefs. The Administrative Law Judge has now reviewed all the evidence in the record and considered the arguments contained in both parties' briefs. The evidence of

record consists the testimony of the plaintiff at hearings and deposition as well as deposition testimony from Jonathan White, Shannon Johnson, Theodore Comer, Ellen Neeley, Gregory Head, Carl Knight, Larry Carlisle and Barbara Miller. There is medical evidence of record from Dr. Byrd, Dr. Berkman, Dr..Ensalada; and Dr. Gaw. The defendant-employer also filed employment records of the plaintiff. The matter is now ripe for decision.

ISSUES

1. Whether the plaintiff's cervical spine condition is related to or caused by the plaintiff's work with the defendant-employer?

2. Whether the plaintiff gave due and timely notice?

3. Whether the plaintiff's claim was filed within the statute of limitations?

4. What is the extent and duration of the plaintiff's occupational disability, if any?

5. Whether the plaintiff is entitled to vocational rehabilitation benefits?

FINDINGS OF FACT

1. The plaintiff, Gregory N. Bullard, was born February 11, 1961 and is now age 39. He completed high school and worked as a stocker and bagger through his high school years before joining the Marine Corpes in 1983. While in the Marine Corps; the plaintiff worked as an air traffic controller for a period of ten years. He went to work for the defendant-employer in February 1995 as a tow motor operator. He remained an employee of the defendant-

employer through April of 2000, although he. last worked on September 7, 1999, the date before he had a triple level fusion-surgery. Not only has the plaintiff not worked for the defendant-employer since 1999, he has not worked anywhere since that day. However, he has re-enrolled in school and is currently studying computer information systems as a junior at West Kentucky University.

2. The plaintiff's story of injury began only .a year or two following his employment with the defendant-employer as a tow motor operator. His job required him to operate a tow motor or forklift throughout each working shift. A good deal of his time was spent looking backwards to back the equipment up and throughout the day he was having to turn *his* neck from side to side to look over his shoulders while operating. the equipment. In. addition to this repetitive motion of his cervical spine, the equipment would sometimes be operated over rough terrain, which would jar or bounce the operator of the equipment on the uneven surfaces. Sometime in 1996, the plaintiff began to develop some stiffness in the area of his neck. The problem continued.up until 1997 and the plaintiff sought the treatment of a chiropractor, Dr. Merrill Patterson, for what he considered to be a stiff neck. During 1997 and 1998, the plaintiff continued to have difficulty and informed' his "teammates" that he was having difficulty with the operation of the equipment due to neck stiffness and headaches. Eventually, the plaintiff began to develop numbness and pain down his extremities.

3. On August 18, 1999 during a visit to Dr. Patterson, Dr. Patterson recommended that the plaintiff permanently refrain from looking back driving a tow motor at work. Dr. Patterson completed a letter addressed to the defendant-employer regarding the plaintiff, wherein he gave the

diagnosis of osteophytosis and fusion of the C6-C7 vertebral bodies and recommended that the plaintiff permanently refrain from looking back driving a tow motor at work. The plaintiff took the letter to his employer and advised that the doctor recommended that the plaintiff permanently refrain from operating the tow motor. The plaintiff was referred, to Dr. Richard Berkman who performed a triple level cervical discectomy and fusion on the plaintiff in September of 1999.

4. Following the surgery in September of 1999, the. plaintiff remained off work and was, in fact, terminated from his employment with the defendant-employer in April of 2000. on May 1, 2000, Dr. Berkman responded in a letter of inquiry to the plaintiff, Gregory Bullard. Dr. Berkman advised that he was saddened to hear that the plaintiff had been, terminated at work and that the plaintiff's imaging studies suggested disease well out of proportion for a person of his age. Dr. Berkman indicated that the imagining studies suggest that the type of work he participated in may have led to accelerated arthritis in his neck. Next, Dr. Berkman responded to an inquiry from defense counsel on July 5, 2000. Dr. Berkman indicated that he had no history from the plaintiff of having hurt his neck at work as a result of a work related injury. He noted that the plaintiff was at maximum medical improvement and could return to work, but he did not believe that the plaintiff could return to his past occupation as a forklift driver due to the amount of head turning required and the vibrations from the machine. However, he felt that the plaintiff could return with occupational rehabilitation and therapy. He felt that the plaintiff would have a 12% impairment as a result of the cervical disc problem and multilevel fusion.

5. After the plaintiff had received the letter relating his cervical spine condition to his work on May 1, 2000, an

independent medical examination was performed by Dr. David Gaw on May 23, 2000. Dr. Gaw noted that the plaintiff's condition had actually began three and one-half years earlier about October of 1998. It was at that time when the plaintiff's pain had become severe enough for him to request medical attention which he did through the chiropractor. At the time of the evaluation, Dr. Gaw noted that the plaintiff had a fusion of C4-C7 for protrusions at those levels and was suffering a significant loss of motion. He felt that the plaintiff would have a 27% impairment under the A.M.A. Guidelines with 17% of that being due to loss of range of motion. Like Dr. Berkman, he felt that the plaintiff could not return to operating a tow motor. In regards to causation, he noted that the plaintiff had been required to wear a seatbelt and drive in reverse, sometimes over rough terrain. The fact that the plaintiff had to wear a seatbelt while operating the tow motor required him to frequently turn his head during operation of the machine. The plaintiff's symptoms included numbness of both upper extremities, neck; pain and headaches. He would limit the plaintiff to maximum lifting of twenty-five to thirty pounds with frequent lifting of ten to fifteen pounds. He felt that the plaintiff would have difficulty using his arms overhead for pushing, pulling or lifting as well as the limited motion in his cervical spine.

6. During the course of the proceedings, the plaintiff was evaluated by Dr. Leon Ensalada on June 28, 2000. Dr. Ensalada noted the plaintiff's history of numbness going back to 1997 which had gotten worse in 1998 and 1999. He noted the fact that the plaintiff had noticed an increase in his pain while looking over his shoulder at work while operating a tow motor. Nevertheless, Dr. Ensalada felt that the plaintiff's condition requiring a three level fusion was due to spondylosis and was due to the natural aging process. He felt

that the plaintiff's work did not contribute in any way to his cervical spine condition which would warrant a 15% impairment to the body as a whole under the A.M.A. Guidelines. The last physician who evaluated the plaintiff was Dr. Robert Byrd who completed a Form 107 dated July 21, 2000. Dr. Byrd assigned the plaintiff a 36% impairment and, like Dr. Gaw and Dr. Berkman, felt that the plaintiff's work contributed to his condition. He would limit the plaintiff to a maximum lifting of twenty-five pounds with no upward, downward or sideways motions of the cervical spine.

PRINCIPLES OF LAW

1. An injury means any work-related traumatic event or series of traumatic events, including cumulative trauma arising out of an in the course of employment which is the. proximate cause producing a harmful change to the human organism evidenced by objective medical findings...K.R.S. 342.0011(1).

2. Permanent partial disability means the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work...K.R.S. 342.0011(11)(b).

3. K.R.S. 342.730(1) (b) provides that an A.M.A. impairment between 11 and 15% has a multiplication factor of 1.25.

4. K.R.S. 342.730(1)(c)(1) provides that if an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of the injury, the benefit for permanent partial disability shall be one and one-

half times the amount otherwise determined under paragraph (b) of K.R.S. 342.730.

5. K.R.S. 342.730(1)(c)(2) provides that if an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of the injury, the weekly benefit for permanent partial disability oherwise payable under paragraph (b), of K.R.S 342.730(1) shall be reduced by one-half for each week day in which the-employment is sustained.

6. Temporary total disability is defined in R.R.S. 342.0011(11) (a) as being the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

7. When as a result of an injury, a claimant is unable to perform work for which he has previous training or experience, he shall be entitled to such vocational rehabilitation services, including re-training and job placement, as may be reasonably necessary to restore him to suitable employment ...K.R.S. 342.710

8. No proceeding for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given tot he employer as soon as practicable after the happening thereof unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the Department within two years after the date of the accident ...K.R.S. 342.185.

9. When a cumulative trauma claim is not filed until more than two years after the worker's discovery of an injury and the fact that it was caused by work, the two year statute of

limitations for workers' compensations claims would operate to prohibit compensation for whatever occupational disability is attributable to trauma that incurred more than two years preceding the filing of the claim. Special Fund v. Clark Ky. 998 S.W.2d 487 (1999).

10. When the notice of an accident or injury is given to an employer "as soon as practicable" depends upon the facts and circumstances of each particular case. Marc Blackburn Brick Company v. Yates, Ky. 424 S.W. 2d 814 (1968).

11. Manifestation of disability has been determined to be the date on which physically and/or occupationally disabling symptoms lead the worker to discover that an injury has been sustained and not necessarily the last date of employment: AlcanFoil Products v. Huff Ky., 2 S.W.3rd 96 (1999).

12. Notice is required when a worker has knowledge of a potentially compensable condition, but delay in giving notice may be excused if a worker can demonstrate reasonable cause for delay. Newburg v. Slone Ky. 846 S.W.2d 694 (1992).

13. Although a claimant degenerative arthritis may be part of the natural aging process, the effects of the degenerative arthritis directly resulting from work activities are compensable under the Workers' Compensation Act. Ingersoll-Rand v. Edwards Ky. App. 2000 WL 1370848 (September 15, 2000).

ANAYLSIS AND CONCLUSIONS

1. The first issue contested by the defendant-employer is the work-relatedness or cause of the cervical spine condition. The evidence clearly indicates that the. plaintiff suffered

from spondylosis at multi-levels of his cervical spine and that the effects of that condition first began to bother the plaintiff in 1996 or 1997. The plaintiff's treating surgeon has indicated that although there was no particular work injury reported to him, the nature of the plaintiff's work would accelerate the arthritis in the plaintiff's cervical spine and noted that the amount of disease present in the plaintiff's cervical spine was well out of proportion to his age. Further evidence in regards to causation comes from Dr. Gaw and Dr. Byrd. Each of these physicians offered opinions that the frequent turning of plaintiff's head while operating a tow motor with the defendant-employer would be the cause of the severe degeneration in the plainttf f's cervical spine. Although Dr. Ensalada offered the opinion that the plaintiff's condition was entirely related to the natural aging process, I am more convinced that this degree of degenerative arthritis was caused by the repetitive motion of the plaintiff's neck which he was exposed to each day at work with the defendantemployer. Therefore, I find that the plaintiff's severe degenerative disc disease in his cervical spine and subsequent triple level discectomy and fusion was proximately caused by the repetitive nature of the plaintiff's work with the defendantemployer.

2. The next contested issue raised by the defendant-employer is the issue of notice. Based upon the evidence, taken as a whole in this proceeding, I am convinced that perceptions are reality to each individual who has testified. The plaintiff clearly states that the first time that he understood that his condition was simply not aggravated by his work, but instead caused by his work was when his chiropractor, Dr. Patterson, gave him a letter in August of 1999 indicating that he permanently should not be looking backward while operating a tow motor at work. He took that letter to his employer in a timely fashion. I believe that all parties have been truthful as

they have testified to their beliefs in this particular case. Clearly, the letter from Dr. Patterson indicates that the plaintiff has a severe condition in his cervical spine and that he should not be doing a precise task while working with the defendant-employer. The plaintiff perceived this to mean that his condition was caused by his work operating a tow motor. Prior to that time, plaintiff was well aware that his work was aggravating his cervical spine. He told his co-employees, supervisors and teammates that his work with the-defendant-employer was bothering him. Nevertheless, prior to August of 1999, no one perceived the plaintiff's work to be the cause of his cervical spine condition. After August of 1999 and the receipt of the letter by Dr. Patterson, the plaintiff perceived that his work was the cause of his cervical spine condition and passed that letter on to his employer. The plaintiff's employer had a different perception from that same letter. Upon my review of the letter, which has been made an exhibit to two different depositions in this action, I can see how the plaintiff logically felt that this letter indicated that his condition was caused by his work. However, I can also see how the defendant-employer logically perceived the letter only to indicate that a non-work related condition was causing the plaintiff work restrictions. The first evidence that I see in regards to the plaintiff having a work-related cervical spine disease which is unambiguous is the letter dated May 1, 2000 from Dr. Richard Berkman. Of course, by that time, the plaintiff had already filed his claim on April 26, 2000. Whether notice of an injury is given as soon as practicable depends on the facts and circumstances of each particular case. When a worker suffers occupational symptoms which lead him to discover an injury has been sustained, he has a duty to give notice as soon as practicable thereafter. Alcan-Foil Products v. Huff, Id. In this particular case, the plaintiff believed that he gave notice in August of 1999 when he perceived that he had been

informed that he had a work-related cervical condition. Actual notice to the defendant-employer occurred with the filing of the Form 101 on April 26, 2000. If a worker demonstrates a reasonable cause for delay in giving notice, then such a delay is excusable. Here, the plaintiff clearly thought he gave notice in August of 1999 by giving his employer the letter from Dr. Patterson which he perceived to indicate a work-related condition. This mistaken belief led to a delay in actual notice, as perceived by the defendant-employer. I find that such delay is excusable under these particular circumstances and therefore I do not find that notice-operates to bar the plaintiff's claim.

3. The defendant-employer also requests dismissal, based upon the failure of the plaintiff to file his claim within the prescribed two year statue of limitations. In a cumulative trauma claim, the plaintiff has two years to file his claim following his discovery of an injury and the fact that it **was** caused by work...Special Fund v. Clark, Id. Here, the plaintiff clearly knew he was having some symptoms prior to August of 1999. There is no evidence whatsoever thatthe plaintiff had any indication that the condition was caused by work until the letter from Dr. Patterson in August of 1999. As the manifestation of disability has been determined to be the date on which symptoms lead a worker to discover that an injury has been sustained, it is clear that discovery of a work-related injury occurred in August of 1999. Although the plaintiff may have had symptoms prior to that time, there was no medical evidence suggesting causation and no indication by the plaintiff, or others who worked with the plaintiff, that they perceived the condition to be caused by his work. In fact, the defendant still argues that the condition was not caused by work. The first real evidence of a work injury which I see is given by Dr. Berkman on May 1, 2000. Nevertheless, the plaintiff's perceptions indicate that he in

fact gained such knowledge in. August of 1999. His claim was filed on April 26, 2000 which is well within the two years statute of limitations. Therefore, the statute of limitations does not operate to bar the plaintiff's claim.

4. The remaining issues for decision include extent and duration of disability and entitlement to vocational rehabilitation benefits. In this case, although the plaintiff has a significant injury, it is clear that the plaintiff is a talented and intelligent individual who is young and in the process of obtaining a marketable education. Although he has some restrictions which would prevent him from returning to his past work, they are not of such a nature that would prevent the plaintiff from performing any work on a regular basis in a competitive economy. Therefore, the plaintiff is entitled to permanent partial disability benefits based upon his impairment applied to the Table found at K.R.S. 342.730. After a thorough review of the medical evidence, I must agree with Dr. Ensalada on his assignment of an impairment rating. I find that Dr. Ensalada is correct in noting the appropriate impairment rating to be 15% and therefore base an award of permanent partial disability benefits on that 15% impairment. The 15% impairment applied to the tables found in K.R.S. 342.730(1)(b) lead to a permanent partial disability of 18.75%. The benefits payable for that 18.75% shall be increased by a factor of 1.5 pursuant to K.R.S. 342.730(1)(c)(1) as the plaintiff lacks the physical capacity to return to his past work. As the plaintiff has not been paid any temporary total disability, I must also determine the period of time in which he would be entitled to temporary total disability benefits for his work-related cumulative trauma injury. The plaintiff has been assigned permanent restrictions by various physicians. He has not reached a level which permit a return to his-past employment but his treating physician, Dr. Berkman indicated that he had reached

maximum medical improvement and could return to some work as of June 5, 2000. Of course, the plaintiff was taken off work for the fusion surgery on September 8, 1999. He is therefore entitled to temporary total disability benefits from September 8, 1999 through June 5, 2000.

5. The next question is whether the plaintiff is entitled to vocational rehabilitation benefits. K.R.S. 342.710 provides that when a claimant is unable to perform work for which he has previous training or experience, he is entitled to vocational rehabilitation services. Here, the plaintiff could clearly not return to his past work. He is attempting rehabilitation and is, in fact, enrolled as a junior in computer science. Therefore, I find K.R.S. 342.710 to be applicable and a vocational evaluation shall be ordered.

6. There is also an issue as to whether the defendant-employer is entitled to credit for short-term disability benefits paid to the plaintiff. The plaintiff argues that there is no entitlement to such an offset as there has been no evidence introduced that the disability policy was solely funded by the defendant-employer. However, I note that K.R.S. 342.730 provides that the employer is indeed entitled to a credit, by operation of law, if such benefits are paid and shall so order that upon proof of compliance with the statute, the employer shall be entitled to a credit.

ORDER

1. The plaintiff shall recover from the defendant-employer the sum of $440.00 per week for temporary total disability benefits from September 8, 1999 through June 5, 2000. Thereafter, beginning on June 6, 2000, he shall receive $123.75 per week for 425 weeks for his 18.75% permanent partial disability award increased by a factor of 1.5 due to his

lack of physical capacity to return to his past work. All benefits are payable together with interest at the rate of 12% per annum on all due and unpaid installments of such compensation. The defendant-employer is given credit for payments heretofore paid as well as for any unemployment benefits received by the plaintiff during the period of temporary total disability. In addition, the defendant-employer is entitled to credit for disability payments paid to the plaintiff through any exclusively employer funded disability plan unless a contrary internal offset provision is contained in said plan. A credit shall be available upon proof that the plan is exclusively employer funded and that no internal offset provision is contained therein.

2. The employer shall pay all reasonable and necessary medical expenses for the cure and relief of his work related injury pursuant to K.R.S. 342.020.

3. Having concluded that plaintiff is unable to perform jobs for which he has prior experience or training pursuant to KRS 342.710, IT IS ORDERED that plaintiff shall undergo a vocational rehabilitation evaluation. Plaintiff will be notified by a Department of Workers Claims rehabilitation counsel of the. date, time and location of the rehabilitation evaluation. IT IS FURTHER ORDERED that the defendant-employer shall pay the rehabilitation provider selected by the Department of Workers' Claims for the vocational evaluation, including prepayment, if necessary.

4. All motions for approval of attorney's fees shall be filed with the Administrative Law Judge within thirty (30) days after the disposition of this award. Any such motion must include an itemization of services together with either the actual times or a reasonably accurate estimate of the times expended on each of the itemized services listed.

SO ORDERED, this 24th day of October, 2000 with copies to all parties by regular U.S. mail.

/s/
JOHN B. COLEMAN
ADMINISTRATIVE LAW JUDGE

(2)

Supreme Court, U.S.
FILED
MAY 5 - 2005
OFFICE OF THE CLERK

No. 04-1424

IN THE

Supreme Court of the United States

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

GREGORY N. BULLARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in following the established substantive law of Kentucky and acted within its discretion in denying petitioner's late request for certification to the Supreme Court of Kentucky, which was waived by petitioner?

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STATEMENT OF THE CASE

Respondent does not accept the petitioner's Statement of the Case, which bears no resemblance to the relevant facts and applicable law. The following are the facts and law which respondent considers essential to a fair and accurate Statement of the Case.

Respondent filed suit in United States District Court against petitioner, his former employer, for wrongful discharge under KRS 342.197, the pertinent Kentucky statute. KRS 342.197(1) mandates that no employee shall be harassed, coerced, discharged or discriminated against in any manner whatsoever for filing and pursuing a workers' compensation claim. In addition, KRS 342.197(3) mandates that any individual injured by any act in violation of subsection (1) shall have a civil cause of action to recover the actual damages sustained by him, together with the costs of the lawsuit, including a reasonable fee for his attorney of record.

At the trial respondent testified that he served in the United States Marine Corps from 1983 to 1993. Before he was discharged in 1993, he was examined by a doctor and passed the physical examination. He was in excellent physical condition. He started working for petitioner in February, 1995. Before beginning his employment with petitioner, he was examined by a doctor chosen by the company. He passed the physical examination by the company doctor, being in excellent physical condition.

Respondent's job was a manual labor job requiring driving a forklift or tow motor. He had to continuously twist and turn his neck on the job to look around behind him, since

90-95% of his work time was spent driving the fork truck in reverse. He had to drive the forklift or tow motor over rough surfaces, causing him a lot of jarring and jostling.

While working for petitioner in 1995 and 1996, respondent's neck started getting "real stiff." He also started getting bad headaches and numbness in his arms and fingers. His physical symptoms gradually developed in 1995 and 1996.

In 1996 respondent went to Dr. Patterson in Russellville for treatment. In August, 1996, Dr. Patterson had x-rays taken of his neck, which were within normal limits for a man his age.

During the years 1996, 1997, 1998 and 1999 respondent's physical symptoms gradually got worse. The numbness in his arms and his headaches got much worse. He continued under Dr. Patterson's treatment.

By the summer of 1999, respondent's physical condition had gotten very poor. His headaches were much stronger, his arms were going numb, and he had neck pain. He told his supervisors that the "fork truck was killing me."

Respondent went to Dr. Patterson for treatment in August, 1999 and Dr. Patterson had repeat x-rays taken of his neck. Dr. Patterson told him that his neck was "destroyed." Dr. Patterson placed permanent restrictions on him, telling him not to drive a forklift or tow motor and giving him a letter so stating to take to his employer.

Respondent delivered Dr. Patterson's letter to the nurses at the plant medical department and also to his supervisors

in August, 1999. He told his supervisors that his neck was hurting and that the fork truck was "just killing him." In August, 1999 he told the plant nurses that he was making a workers' compensation claim. Petitioner did not take a statement from him about his work injury or investigate his workers' compensation claim.

Respondent was referred to Dr. Berkman, a neurosurgeon in Nashville, Tennessee, who examined his neck and had an MRI of his neck performed. In September, 1999, Dr. Berkman told him and his wife that his neck had been "destroyed by his work on the fork truck." Respondent again told the nurses at the plant that he was making a workers' compensation claim based on what Dr. Berkman told him.

In September, 1999 Dr. Berkman had respondent admitted to the hospital and performed a three-level cervical fusion. After the neck surgery, Dr. Berkman placed permanent physical restrictions on him, telling his employer that he was totally disabled. Under the physical restrictions placed on him by Dr. Berkman, respondent was unable to return to his former job at the plant. He last worked for petitioner on September 7, 1999.

In 1999 respondent was attending Western Kentucky University, studying computer science. After he had his neck surgery in September, 1999, he asked Devon Harper, petitioner's personnel manager, for a lighter job working with computers or in the finance department. These were light jobs for which he was trained and educated. Petitioner had computer jobs and accounting jobs available in the plant at that time, but refused to give him a computer or accounting job.

Petitioner fired respondent on April 12, 2000. Devon Harper, the personnel manager, and Larry Carlisle, his supervisor, told him that they were going to terminate him. Larry Carlisle, his supervisor, told him that he was being fired for making a false workers' compensation claim. Devon Harper, the personnel manager, told him that the company was paying him and was not getting anything out of him.

Respondent filed a formal workers' compensation claim. The Administrative Law Judge in the workers' compensation case decided the case in his favor in both 2000 and 2002, awarding him workers' compensation benefits, including his medical bills and expenses and the costs of his education at Western Kentucky University. Petitioner then appealed the Judge's decision to the Workers' Compensation Board, which unanimously affirmed the Administrative Law Judge's decision. Petitioner then appealed the case to the Court of Appeals of Kentucky.

Petitioner refused to pay respondent any workers' compensation benefits and he had to pay the costs of his education at Western Kentucky University out of his own pocket. He had no income, was unable to pay his bills and had to file bankruptcy in late 2000.

At the trial, respondent testified that on numerous occasions between August, 1999 and the time he was fired in April, 2000, he told the plant nurses and his supervisors that he was going to make a workers' compensation claim for his neck injuries.

Respondent's testimony on direct examination and re-direct examination appears in the Transcript of Jury Trial, Vol. 1, PP. 90-116 and PP. 139 & 140.

Dr. Merrill Patterson, respondent's treating chiropractic physician, testified that he has practiced his profession in Russellville, Kentucky for 33 years and has treated respondent since 1996.

Dr. Patterson first treated respondent on August 2, 1996, at which time he related that he was having headaches, neck pain and stiffness and numbness in his hands. Dr. Patterson had x-rays taken of respondent's neck, which were within normal limits for a man his age. Dr. Patterson continued to treat him in 1996, 1997 and 1999, seeing him on approximately 15 occasions. Respondent continued to have symptoms of stiffness and pain in his neck, as well as headaches. His neck pain got worse.

On August 17, 1999, Dr. Patterson had repeat x-rays taken of respondent's neck, which showed significant advanced disc and spinal degeneration and deterioration. The 1999 x-rays showed neck injuries way out of proportion for a man his age.

Dr. Patterson testified that respondent's history was that he started working at the Alcan plant in 1995 at a job driving a forklift or tow motor, that he spent 90% of his time backing up and driving in reverse and that he had to constantly look over both shoulders behind him and constantly twist and turn his neck, that he also drove over rough surfaces most of the time, getting a lot of jarring and jostling, and that from 1995 to 1999 he gradually developed stiffness and pain in his neck and numbness in both arms and headaches. On August 18, 1999, Dr. Patterson gave respondent a letter and told him to deliver it to his employer. In the letter Dr. Patterson recommended that respondent permanently refrain from looking back driving a towmotor at work, and restricted his lifting.

Dr. Patterson testified that it was his opinion, based on reasonable chiropractic probability, that respondent suffered injuries to his neck due to his work at the petitioner's plant during the years 1995 to 1999 and that the repetitive wear and tear to his neck caused the neck injury which he found in August, 1999. Dr. Patterson based his opinions on his professional education, reliable chiropractic literature, 33 years of practice in his profession and his treatment of respondent Bullard since 1996.

Dr. Patterson's trial testimony appears in the Transcript of Jury Trial, Vol. 1, PP. 140-151 and 156-157.

Respondent's wife also testified at the trial. She stated that before her husband started working at petitioner's plant in 1995, he was in excellent physical condition and had never had any previous injuries to his neck or arms.

During the years respondent worked at the plant from 1995-1999, he complained frequently of headaches, neck pain, numbness in his arms and tingling in his hands. His neck pain and arm pain gradually got worse from 1995-1999.

She went with her husband to Dr. Berkman's office in September, 1999. After Dr. Berkman examined him and read his neck x-rays and MRI, he told them that his neck symptoms were probably the result of the fork truck operation and twisting and turning of his neck.

Her testimony appears in the Transcript of Jury Trial, Vol. 1, Pages 158-163.

Respondent testified on rebuttal at the trial. He stated that he did not apply for long-term disability benefits with petitioner because Devon Harper, the personnel manager, told him that his chances of getting such benefits were "slim to none." In addition, he never received any papers on which he could make an application for such benefits. He refuted the testimony of Linda Pillow, the physical therapist, and stated that he did not fill in the form stating that he did not have a work injury. Respondent testified that it had been ruled by the judge in his workers' compensation case that the handwriting on the form was not his.

Respondent's rebuttal testimony appears in the Transcript of Jury Trial, Vol. 2, PP. 20-35.

At the trial in District Court, the jury awarded respondent damages against petitioner and a Judgment and Amended Judgment were entered in favor of respondent.

In the first Opinion, Award and Order in the workers' compensation case, dated October 24, 2000, the Administrative Law Judge ruled that:

1. Respondent's neck injury was caused by his work for his employer;

2. He gave due and timely notice of his work injury to his employer;

3. His workers' compensation claim was filed within the statute of limitations;

4. He is entitled to recover from his employer workers' compensation benefits, consisting of temporary total

disability benefits from September 8, 1999 to June 5, 2000, permanent partial disability benefits beginning on June 6, 2000 for 425 weeks, his work-related medical bills and expenses and also benefits for vocational rehabilitation. The Administrative Law Judge allowed petitioner a credit or setoff for the contractual short-term disability benefits ($18,579.00) which it paid to respondent to apply against the workers' compensation benefits for temporary total disability.

On March 21, 2001, the Workers' Compensation Board unanimously affirmed the Administrative Law Judge's Opinion, Award and Order in favor of respondent against his employer. The Workers' Compensation Board ruled that his neck injury was caused by his work, that he gave due and timely notice of his work injury to his employer, that he filed his workers' compensation claim well within the statute of limitations and that he was entitled to recover workers' compensation benefits from his employer.

Petitioner then moved to reopen the case before the Administrative Law Judge, claiming fraud and newly discovered evidence. The workers' compensation case was relitigated before the Administrative Law Judge. On August 16, 2002, the Administrative Law Judge rendered his Opinion and Order on Reopening, finding that respondent testified credibly throughout the case, that there was no fraud, that the additional evidence showed that his neck injury was caused by his work for petitioner, that he gave due and timely notice of his work injury to his employer and that he was entitled to recover workers' compensation benefits from his employer. The Administrative Law Judge dismissed petitioner's Motion to Reopen and affirmed his previous October, 2000 Opinion and Award.

Petitioner then appealed to the Court of Appeals of Kentucky. The Court of Appeals of Kentucky in an unanimous opinion rendered on February 7, 2003 affirmed the prior decisions of the Administrative Law Judge and the Workers' Compensation Board, holding that substantial evidence and the applicable law supported the previous rulings confirming respondent's neck injury, due and timely notice to his employer of his work injury, the filing of his workers' compensation claim within the statute of limitations and his entitlement to workers' compensation benefits.

Petitioner then appealed to the Supreme Court of Kentucky, which affirmed the Administrative Law Judge on the statute of limitations and medical causation issues, but remanded the case to the Administrative Law Judge to determine whether petitioner was prejudiced by failure to receive earlier notice. The Administrative Law Judge ruled in his Order on Remand dated October 11, 2004 and Order on Reconsideration dated December 3, 2004 that there was no prejudice to petitioner in any way and again ordered petitioner to pay respondent workers' compensation benefits. Petitioner then appealed to the Workers' Compensation Board of Kentucky, which by Order dated April 15, 2005 held that there was ample substantial evidence to support the Administrative Law Judge's ruling in favor of respondent.

This case was briefed and argued in the United States Court of Appeals for the Sixth Circuit, which rendered its comprehensive and well-reasoned Opinion on November 3, 2004, affirming on de novo review the Amended District Court Judgment in favor of respondent. All three members of the panel agreed that the District Court Amended Judgment should be affirmed.

Petitioner then filed in the Court of Appeals a Petition for Panel Rehearing and rehearing en banc, for the first time asking the Court of Appeals under Rule 76.37 of the Kentucky Rules of Civil Procedure to certify a question of law to the Supreme Court of Kentucky. The Court of Appeals circulated the Petition to the three members of the original panel and also to all other active Judges of the Court of Appeals, and no Judge of the Court of Appeals requested a vote on the petition for rehearing en banc, and the original panel reviewed the Petition for Rehearing and unanimously concluded that the issues raised in the Petition for Rehearing were fully considered upon the original submission and decision of the case. By Order dated January 21, 2005 the Court of Appeals denied petitioner's Petition for Rehearing.

REASONS FOR DENYING THE PETITION

Review is not appropriate for three reasons. First, the Court of Appeals correctly applied settled Kentucky substantive law in affirming the District Court Judgment. The Court of Appeals cited the pertinent Kentucky statutes and the numerous decisions of the Kentucky appellate courts. Second, there is no conflict among the circuits. The Court of Appeals' Order denying petitioner's Petition for Rehearing follows the same governing principles as has every federal Court of Appeals in considering a request that the Court of Appeals certify a question of law to a state Supreme Court. Third, this case's procedural history warrants denial of review. Petitioner never filed a motion asking the Court of Appeals to certify a question of law to the state Supreme Court of Kentucky. After the Court of Appeals rendered its Opinion, the petitioner in its Petition for Rehearing belatedly attempted to request the Court of Appeals to certify a question of law to the Supreme Court of Kentucky. Petitioner waived

its motion for certification to the Supreme Court of Kentucky. The Court of Appeals acted properly in its discretion in denying petitioner's Petition for Rehearing.

ARGUMENT

In its Opinion, the Court of Appeals noted that

> "To prevail on a workers' compensation retaliatory discharge claim under Kentucky statute KRS 342.197(1), the plaintiff must prove that he was: (1) 'engaged in statutorily protected activity,' (2) was discharged, and (3) 'there was a connection between the protected activity and the discharge.' *Henderson v. Ardco, Inc.*, 247 F.3d 645, 654 (6th Cir.2001) (quoting *Willoughby v. GenCorp., Inc.*, 809 S.W.2d 858, 861 (Ky.Ct.App.1990)). An employee may maintain a retaliatory discharge claim under KRS 342.197 where the employer fires the employee before the employee institutes formal compensation proceedings. *Overnite Transportation Company. v. Gaddis*, 793 S.W.2d 129, 130 (Ky.Ct.App.1990). A claim is established if the plaintiff proves she 'intended to file and pursue a lawful workers' compensation claim.' *Southerland v. Hardaway Management Co., Inc.*, 41 F.3d 250, 256 (6th Cir. 1994) (quoting *First Property Management Corporation v. Zarebidaki*, 867 S.W.2d 185, 189 (Ky. 1994))."

The Court of Appeals further noted that

> "An employer may be held liable under KRS 342.197(1) for retaliatory discharge if the jury believes that the employee's pursuit of a workers' compensation claim was one of the substantial factors motivating the discharge decision, notwithstanding proof that the employee would have lawfully been discharged anyway. *First Prop. Mgmt. Corp.*, 867 S.W.2d at 188. An employee is not entitled to recovery if the employer proves the employee was discharged 'solely because of her inability to perform her job.' *Southerland*, 41 F.3d at 256."

The Court of Appeals further stated that

> "Bullard was not required to provide Alcan with statutory notice under KRS 342.197(1). *Overnite Transp. Co.*, 793 S.W.2d at 130-31. The issues of when an employer knew that an employee intended to pursue a workers' compensation claim, and when an employer received written statutory notice under KRS 342.185(1), are completely different. Relative to Alcan's pre-termination knowledge of Bullard's intent to pursue a workers' compensation claim, Bullard testified to the jury that he told Alcan plant nurses, a safety representative, and a supervisor well before he was discharged that he believed his neck injury was caused by driving the forklift, and that he intended to 'make' a workers' compensation claim. Bullard further testified that team leader Carlisle told him the day he was discharged that 'you're being fired

> for making a false workers' comp. claim.' Construed in a light most favorable to Bullard, reasonable jurors could conclude that Alcan knew prior to discharge that Bullard intended to pursue a workers' compensation claim, and relied on that knowledge as a substantial factor in firing Bullard, notwithstanding Alcan's proofs to the contrary that Bullard was discharged for misrepresentations he made relative to tuition benefits. *See First Prop. Mgmt. Corp.*, 867 S.W.2d at 188. Whether an employer was motivated to discharge an employee for intending to file a workers' compensation claim is ultimately for the jury to decide." *Willoughby*, 809 S.W.2d at 862.

The Court of Appeals held that the doctrine of collateral estoppel did not bar Bullard from litigating whether and when Alcan knew Bullard intended to pursue a workers' compensation claim, and whether Alcan's knowledge of that intent was a substantial factor used in the decision to discharge Bullard.

The Court of Appeals therefore affirmed the District Court's Amended Judgment.

Rule 76.37 of the Kentucky Rules of Civil Procedure provides that any United States Court of Appeals *may* invoke the rule upon the Court's own motion or upon motion by any party and certify to the Supreme Court of Kentucky a question of Kentucky law where there is no controlling precedent in the decisions of Kentucky appellate courts. The rule clearly vests in the United States Court of Appeals discretion as to whether it should certify a question of law to the Supreme Court of Kentucky if the Kentucky appellate courts have not already decided the matter.

The various United States Court of Appeals have consistently ruled that where there are sufficient sources of state law, including state appellate court decisions deciding the question, the Court of Appeals will deny a party's motion for certification to the state Supreme Court and decide the issue itself. *See State of Florida ex rel Shevin v. Exxon Corporation*, 526 F.2d 266 (5th Cir. 1976), *American Fidelity Bank & Trust Company v. Heimann*, 683 F.2d 999 (6th Cir. 1982), *Cantwell v. University of Massachusetts*, 551 F.2d 879 (1st Cir. 1977), *Jefferson v. Lead Industries Association, Inc.*, 106 F.3d 1245 (5th Cir. 1997), *Rural Water System #1 v. City of Sioux Center*, 202 F.3d 1035 (8th Cir. 2000), *Perkins v. Clark Equipment Company*, 823 F.2d 207 (8th Cir. 1987), *McLinn v. The F/V Fjord*, 744 F.2d 677 (9th Cir. 1984), *Massengale v. Oklahoma Board of Examiners in Optometry*, 30 F.3d 1325 (10th Cir. 1994), *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65 (7th Cir. 1981) and *Armijo v. Ex Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988).

The cases cited by petitioner are clearly not on point with the applicable law and the relevant facts in our case. In those cases the state substantive law was unsettled and the Courts of Appeal exercised their discretion to certify the question to the state court, which is completely unnecessary and not appropriate in our case. Here the Kentucky substantive law was established and the Court of Appeals acted properly within its discretion in denying the petitioner's Request for Rehearing. In addition, the petitioner failed and refused to file with the Court of Appeals a timely motion to certify the question of law to the Supreme Court of Kentucky. It was only after the Court of Appeals had rendered its Opinion that petitioner filed a Petition for Rehearing, belatedly attempting to request the Court of Appeals to certify a question of law to the Supreme Court of Kentucky. This

was too late and petitioner clearly waived its request for certification. The Court of Appeals properly and unanimously denied petitioner's Petition for Rehearing.

The bottom line here is that petitioner's argument is both substantively and procedurally defective.

CONCLUSION

It is clear that certiorari is not warranted. The Court of Appeals correctly applied settled Kentucky substantive law. There is no conflict among the circuits. Petitioner's argument is both substantively and procedurally defective. Because there are no valid grounds for granting review, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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